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A Hornbook to the Code

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A HORNBOOK TO THE CODE*

This comment is designed to acquaint the reader with the major sections of the Revised Washington Criminal Code. In addition to analyzing the language and operative effect of each section, the student authors have compared each section with its counterpart under the present law and with the different positions taken by other modern revised criminal codes. This comment is intended to supplement, not replace, the official comments to the Code; therefore, the student authors have concentrated on raising a number of issues not dealt with in the official comments.

I. CLASSIFICATION OF OFFENSES

One of the major accomplishments of Washington's Proposed Criminal Code is the consistent classification of offenses. The existing law, which is the product of generations of differing legislative moral judgments, contains at least nineteen categories of sentences.[1] The

* The following students have contributed to this comment: Peter L. Buck (Family Offenses, Public Indecency); Joseph C. Calmes (Assault); Robert H. Campbell (Arson, Burglary); Harvey H. Chamberlin (Principles of Liability and Responsibility, The Defense of Criminal Insanity); Dwight J. Drake (Kidnapping); G. Douglas Ferguson (Disorderly Conduct); Donald J. Hagen (Homicide); James C. Harrison (Justification); Stephen B. Hazard (Sexual Offenses); Barbara L. Johnston (Classification of Offenses); Laurie D. Kohli (Mistake of Fact and Mistake of Law, Violations); Paul E. Krug (Anticipatory Offenses); Michael R. Sorensen (Theft and Robbery, Fraud).

1. A brief review of the provisions of Title 9 of WASH. REV. CODE (1959) reveals the following sentences (in order of apparent decreasing severity). Alternative or concurrent fines are omitted although a review of those provisions would greatly increase the number of different dispositions available.

death
life or death (determined by jury)
life imprisonment
not less than 10 years
not less than 7½ years
not less than 5 years
not less than 1 year
not more than 20 years
not more than 15 years
not less than 1 nor more than 14 years
not more than 10 years
not less than 1 nor more than 10 years
not more than 5 years
not more than 2 years
not less than 3 months nor more than 1 year (jail)
not more than one year (jail)

The existing law is replete with inconsistencies. For example, "not less than one year" is roughly equivalent to "not more than twenty years" since WASH. REV. CODE §

Proposed Code reduces this quagmire to three categories of felonies, two categories of misdemeanors and a "violation" category.[2] The range of sentences remains much the same, from punishment by death,[3] to imprisonment in the county jail for not more than ninety days.[4] However, the sentences for all offenses have been collected and classified in one section of the Code,[5] whereas each offense in the existing code contains within its own definition section a specification of the sentence to be accorded the offender. Generally, existing law specifies the sentence in terms of a minimum or maximum term of years, often with an alternative or concurrent fine. However, some crimes are merely classified as "felonies," "gross misdemeanors" or "misdemeanors," with specification of the sentence for these categories found in R.C.W. §§ 9.92.010-.030.[6]

The Proposed Code differs from the present law in several respects. First, the Code has added an alternative fine not to exceed twice the

9.95.010 (1959) requires the judge to set a maximum term of at least twenty years where no specific term is provided for by statute. It is doubtful, however, that the legislature intended that the selling of erotic materials to a minor (not less than one year for the third offense; WASH. REV. CODE § 9.68.060 (Supp. 1971)) be equivalent in severity to carnal knowledge of a female child between ten and fifteen years of age (WASH. REV. CODE § 9.79.020(2) (1959)).

2. REV. WASH. CRIM. CODE §§ 9A.20.010-.020 [hereinafter cited as R.W.C.C.].

3. In the existing Washington law, punishment by death is authorized for treason, WASH. REV. CODE § 9.82.010 (1959), and this section would not be repealed by the Proposed Code. An examination of the reported cases reveals no instances in which the treason statute has been applied, however. The existing law provides that in the cases of first degree murder and first degree kidnapping, the jury shall decide between life imprisonment and the death penalty. WASH. REV. CODE §§ 9.48.030, 9.52.010 (1961). The Proposed Code limits the death penalty to murder (R.W.C.C. § 9A.32.025), but this provision will have to be scrutinized in light of the United States Supreme Court's decision in Furman v. Georgia, 92 S. Ct. 2726 (1972).

4. In both the existing law and the Proposed Code, the classification "misdemeanor" carries a ninety day jail sentence. WASH. REV. CODE § 9.92.030 (1959) and R.W.C.C. § 9A.20.020(3). The alternate fine has been increased in the Proposed Code from $250 to $500, "primarily as a reflection of the diminished worth of a dollar." R.W.C.C. § 9A.20.030, Comment at 99.

5. R.W.C.C. §§ 9A.20.010-.030.

6. The Proposed Code's simplification of the penalty scheme for offenses is similar to that undertaken by other recently revised state criminal codes. In New York, for example, a classification system more confused than that existing under present Washington law was condensed into five classes of felonies, three classes of misdemeanors, one class of violations and one class of traffic infractions. N.Y. PENAL LAW §§ 55.05-.10 (McKinney 1967). The greater number of classifications in New York's revised code may be due to the fact that (a) New York revised a larger proportion of the existing criminal law than does Washington's Proposed Code; (b) the new sentencing provisions cover not only the new laws of the recently adopted New York Code, but also every offense defined elsewhere in New York law; and (c) more discretion in sentencing is given the judge in New York than in Washington.

In Washington the judge's discretion is limited by WASH. REV. CODE § 9.95.010 (1959), which requires that the offender be sentenced to the maximum term allowable.

amount of the defendant's gain from the commission of the crime.[7] This provision is similar to sections found in the proposed or recently adopted penal codes of several states.[8] Under the new provision, an offender might be required to pay twice the amount of his gain into court, plus restitution to the victim—potentially a cumulative payment of three times the amount of gain.[9] The section presents a potential conflict in the case of a felon who may be economically incapable of paying a heavy fine in addition to restitution, court costs and family support.[10] Arguably the judge should receive some legislative guidance in ordering the priorities of thse various demands on a defendant's economic resources.

Second, the Code provides for the imposition of a fine of up to $10,000 for a first degree felony as an alternative to a minimum of

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The Board of Prison Terms and Parole is given discretion to set the length of the term served by the offender. These provisions will not be repealed by the Proposed Code. In New York, on the other hand, the judge is given greater discretion to determine the length of the sentence. *See, e.g.*, N.Y. PENAL LAW § 70.00 (McKinney 1967). The result is that the Washington codes, present and proposed, tend to provide for uniform sentencing within the system.

The Model Penal Code, based on the premise that the "court should play a substantial role in sentencing," contains a classification of offenses quite similar to that found in Washington. MODEL PENAL CODE § 6.07, Comment (Tent. Draft No. 2, 1954) [hereinafter cited as M.P.C.]. The Model Code provides for three classes of felonies, two classes of misdemeanors and one class of violations, but evidences throughout the intention that the court shall have a great deal of discretion in sentencing. *See, e.g.*, M.P.C. § 6.11 (Tent. Draft No. 2, 1954), wherein the court is given authority to reduce the degree of crime for which the defendant is convicted and therefore reduce the sentence imposed.

7. R.W.C.C. § 9A.20.030. Under the proposed federal code, the alternative fine would be the larger of twice the actor's gains or twice the victim's loss. PROPOSED NEW FEDERAL CRIMINAL CODE § 3301(2) (1971).

8. *See, e.g.*, M.P.C. § 6.03(5) (Tent. Draft No. 2, 1954); ORE. REV. STAT. §§ 161.625, .635, .655 (1971); N.Y. PENAL LAW, art. 80 (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-44 (Supp. 1972).

9. *See* R.W.C.C. § 9A.20.030, Comment at 100. WASH. REV. CODE § 9.95.210 (1959), which would not be repealed by the Proposed Code, allows the judge to impose on the defendant such payments "as are necessary (1) to comply with any order of the court for the payment of family support, (2) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question, and (3) to pay such fine as may be imposed and court costs . . . ."

The New York code also apparently allows such a triple payment. N.Y. PENAL LAW § 65.10 and art. 80 (McKinney 1967). Under New York law, however, the court may *only* impose a fine if the defendant has gained money or property through the commission of the crime. No alternative fine in a specific amount is available to New York judges, except in the case of a corporation. *Id.*, § 80.10.

10. Of the recently proposed and adopted penal codes only Michigan has explicitly recognized the potential conflict between the imposition of a fine and restitution to the victim. MICH. REV. CRIM. CODE § 1510 (Final Draft 1967) provides that a fine may not be imposed if it will "prevent the defendant from making restitution or reparation to the victim of the crime."

twenty years' imprisonment.[11] This represents a substantial departure from current law in that no existing crime which is the equivalent of a first degree felony under the Proposed Code has an alternative penalty of a fine.[12] The change may represent a desire to penalize corporations for first degree felonies, although it is difficult to imagine circumstances under which a corporation could be convicted of any such crime.[13] It is more likely, however, that this change represents a misguided and internally inconsistent attempt to broaden the discretion given the judge in sentencing an individual. Arguably, the judge should be given discretion to impose a fine combined with restrictive probation conditions, but the wording of the proposed statute allows the imposition of a fine *alone,* a considerably less potent sanction (especially for a rich man) than the alternative *minimum* term in a correctional institution of at least twenty years.[14] Whatever the purpose of including such a mild alternative to an extremely severe term of imprisonment, the legislative intent should be made more explicit.

Notably absent from both existing and proposed Washington law, is any specification of the criteria to be considered by the court in determining the sentence.[15] The reason for this omission may be that

11. R.W.C.C. § 9A.20.020. The fine may also be assessed concurrent with imprisonment. *Id.*

12. Under the Proposed Code, the first degree felonies are found in R.W.C.C. §§ 9A.32.020 (murder), 9A.40.010 (kidnapping), 9A.44.040 (first degree rape), 9A.48.010 (first degree arson), 9A.52.010 (first degree burglary) and 9A.56.170 (first degree robbery). The roughly equivalent present law provisions are found respectively in WASH. REV. CODE §§ 9.48.030, 9.52.010, 9.79.010, 9.09.010, 9.19.010, and 9.75.010 (1961).

13. The drafters of the proposed California Penal Code apparently concluded that a corporation could not commit a first degree felony; they propose that any person convicted of a first degree felony "shall" be sentenced to prison, and no provision is made for an alternative fine. STAFF OF JOINT LEGISLATIVE COMM. FOR THE REVISION OF THE PENAL CODE, STATE OF CALIFORNIA, THE CRIMINAL CODE §§ 315, 325 (1971). It should be noted, however, that the range of offenses classified as first degree felonies is smaller in California's proposed code than it is in Washington's.

14. It is at least questionable whether a choice between a fine of $10,000 or a minimum twenty year prison term for a first degree felony should be within the discretion of the judge. In practice, the discrepancy should pose few problems, however, since Washington judges rarely fine felony offenders. WASHINGTON STATE SUPERIOR COURT JUDGES' ASSOCIATION, FACTORS AFFECTING JUDICIAL DISCRETION IN FELONY SENTENCING IN WASHINGTON STATE 69-70 (1971).

15. Throughout the New York provisions relating to sentencing, criteria are set out to be considered by the court in determining the sentence. N.Y. PENAL LAW tit. E (McKinney 1967). Many proposed and recently adopted penal codes in other jurisdictions have also carefully described factors to be considered by the court in sentencing convicted offenders. *See, e.g.,* M.P.C. Art. 7 (Tent. Draft No. 2, 1954); MODEL SENTENCING ACT ART. 3 (1963); ORE. REV. STAT. §§ 161.645, .705-.735 (1971); CONN GEN. STAT. ANN. §§ 53a-29, 53a-34, 53a-40 (Special Pamphlet 1972).

Proposed and adopted penal codes in other jurisdictions sometimes include a set of

much of the discretion given to the judge in other jurisdictions is given to the Board of Prison Terms and Parole in Washington.[16] Nevertheless, several options may be "implemented solely through an exercise of judicial discretion . . . ."[17] The basic judicial decisions of whether to grant probation, the conditions to be imposed on such a grant, whether to impose a fine, and what recommendation to make in imposing a prison sentence, are considerations in which Washington judges should have some statutory guidance, as do the judges in many other jurisdictions.[18]

Violations

Finally, a significant innovation in the classification scheme is the creation of the new "violation" category.[19] A violation is a non-criminal offense under the Code. One convicted of a violation will be subject only to a fine, which may not exceed $500;[20] he will

criteria for imposition of fines, a feature which Washington law, present or proposed, lacks. For example, M.P.C. § 6.03 allows the imposition of a fine of up to $10,000 for a first degree felony, subject to the criteria set out in M.P.C. § 8.02. A fine is not to be imposed under the Model Penal Code unless the defendant has derived a pecuniary gain or a fine is specially adapted to deterrence or correction. In addition, a fine may not be imposed if it will interfere with restitution or the defendant will be unable to pay it. Similar provisions are found in ORE. REV. STAT. §§ 161.625-.645 (1971).

Other states allow imposition of a fine for first degree (or equivalent) felonies only under limited circumstances. In New York, for example, no fine may be imposed unless the offender realized a gain of money or property through commission of the crime, N.Y. PENAL LAW § 80.00 (McKinney 1967), and in the proposed Michigan Code the sentence for a class A or B felony (other than for a corporation) cannot consist *solely* of a fine. MICH. REV. CRIM. CODE §§ 1210 (4)(b) and 1505 (1967). California's Proposed Code does not allow imposition of a fine for first degree felonies under any circumstances. STAFF OF JOINT LEGISLATIVE COMM. FOR THE REVISION OF THE PENAL CODE, STATE OF CALIFORNIA, THE CRIMINAL CODE § 325 (1971).

16. *See* note 6 and accompanying text *supra*.

17. Mempa v. Rhay, 68 Wn.2d 882, 884, 416 P.2d 104, 105 (1966), *rev'd on other grounds*, 389 U.S. 128 (1967).

18. See WASHINGTON STATE SUPERIOR COURT JUDGES' ASSOCIATION, FACTORS AFFECTING JUDICIAL DISCRETION IN FELONY SENTENCING IN WASHINGTON STATE 9-11 (1971) for a fuller discussion of the present omissions in Washington law relating to sentencing. The validity of this discussion would not be altered by the adoption of the Proposed Code.

19. R.W.C.C. § 9A.04.040(3):

An offense constitutes a violation if:

(a) it is so designated in this Title or in any other statute of this state defining the offense; or

(b) no other sentence than a fine, or fine and forefeiture or other civil penalty is authorized upon conviction; or

(c) it is defined by a statute other than this Title which provides that the offense is a prohibited act without designating it a crime.

20. R.W.C.C. § 9A.20.020(4).

not acquire a criminal record nor be subject to any other penal disadvantage, including imprisonment.

The stated purpose of this new classification is to give the legislature some measure of flexibility in discouraging certain acts without imposing an overly harsh penalty. Further, a category of offenses which carries with it no possibility of imprisonment is not only advisable but is necessary in terms of economics, caseloads and manpower.[21] As the Proposed Code now stands, eleven offenses have been classified as violations.[22] Most of these involve a lowering of the sanctions imposed by the present law; however, in three instances, conduct which presently is not subject to sanction has been made unlawful, and is punishable as a violation.[23]

The violation classification is a desirable and necessary tool which the drafters wisely included in the Code. However, it appears that the inclusion of this category was poorly planned and incompletely accomplished. One glaring omission is apparent upon examining the violation provision of the Proposed Revised Seattle Criminal Code.[24] The drafters of that code took care to insert a provision expressly stating that a person charged with committing a violation shall not be denied any of the "constitutional rights he would have were the penalty deemed criminal."[25] Lacking such a provision, the Proposed Code creates potential problems in determining the rights to be afforded a defendant in this quasi-civil area.

Other questions arise when an attempt is made to define the ambit of the violations category. The Code specifically provides that the violation provisions apply to non-Title Nine offenses, unless it is ex-

21. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972).

22. The eleven offenses which have been classified as violations are R.W.C.C. §§ 9A.28.010(3)(f) (attempt to commit a misdemeanor); 9A.28.020(2)(e) (criminal solicitation to promote a misdemeanor); 9A.28.030(3)(e) (conspiracy to commit either a misdemeanor or a gross misdemeanor); 9A.52.060 (third degree criminal trespass); 9A.56.050(3)(c) (appropriation of lost property worth less than $50); 9A.76.020 (unreasonably refusing or failing to summon aid upon request of a person known to be a police officer and who is not injured nor threatened with injury); 9A.76.065(2)(a) (a relative rendering criminal assistance to a person who has committed a misdemeanor or a gross misdemeanor); 9A.76.070 (hindering apprehension of an escapee from a mental institution or other such detention facility); 9A.84.030 (disorderly conduct); 9A.84.060 (loitering); and 9A.88.030 (patronizing a prostitute).

23. R.W.C.C. §§ 9A.28.020(2)(e), 9A.76.065(2)(a), and 9A.88.030.

24. PROPOSED REVISED SEATTLE CRIMINAL CODE § 12A.01.090(3), (4).

25. *Id.*, § 12A.01.090(4).

pressly provided otherwise.[26] Section 9A.04.040(3) states that "an offense constitutes a violation if . . . no other sentence than a fine, or fine and forfeiture or other civil penalty is authorized upon conviction . . . ." Therefore, any non-Title Nine offense now punished solely by a fine would become a violation. A conceptual problem is created, however, in the case of a non-Title Nine offense which is punished solely by a fine greater than $500,[27] for the Code further provides that "every person convicted of a violation shall be punished by a fine of not more than five hundred dollars."[28] Thus a classification dilemma arises: is such an offense a violation or not? If indeed it is a violation, may the fine exceed $500? A solution to this conceptual difficulty may be provided by a sequential reading of the relevant Code provisions; *i.e.*, if an offense is punished solely by a fine, it is a violation; therefore that fine *may not* exceed $500 notwithstanding any statutory provisions to the contrary.

Finally, the drafters of the Proposed Code have failed to deal adequately with the practical problems of enforcement in this area.[29] Again, the Proposed Seattle Criminal Code includes some provisions which may serve as a guideline. The drafters of that code propose that if the actor is suspected of having committed a violation, a citation be issued; the alleged violator may not be taken into custody unless the officer cannot reasonably ascertain the actor's identity.[30] In the latter case, the accused may be taken into custody only for fingerprinting and other enumerated procedures and must be released immediately thereafter. The accused may be arrested and bail may be set only if the accused violates his promise to appear in court. While these provisions may inconvenience the violator who fails to carry adequate identification, they nonetheless are necessitated by the inevitable situations in which the violator refuses to cooperate with the officer who apprehends him.

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26. R.W.C.C. § 9A.04.050(2) provides that "the provisions of chapters 9A.04 through 9A.28 RCW are applicable to offenses defined by this Title or another statute, unless this Title or such other statute specifically provides otherwise."

27. A scanning of various non-Title Nine offenses revealed no penalties involving only fines of more than $500. Therefore the problem posed may be theoretical in nature. However, it is foreseeable that some future legislation may create an offense which is punishable by a fine greater than $500, in which case the same questions would arise.

28. R.W.C.C. § 9A.20.020(4)(a).

29. For another view of the problems in enforcing the violations category, see Holmquist, *The Draftsman's View of the Revised Code*, at pp. 280-81 of this volume.

30. *See* the discussion of the violations provisions in the section entitled *Code Summary*, PROPOSED REVISED SEATTLE CRIMINAL CODE at 22.

The potential failure of some persons to pay the fines assessed for their violations raises another problem of enforcement. The Code specifically provides that those guilty of violations are not to be imprisoned solely for failure to pay their fines; as an alternative the Code authorizes the court to employ civil sanctions for contempt or other civil remedies to satisfy unpaid judgments.[31] While this provision is reasonable, and probably mandatory under the Supreme Court's decision in *Tate v. Short*,[32] it too raises questions of enforcement. If an indigent is unable to pay his fine, he cannot be convicted of contempt; therefore the court must turn to "other civil remedies" to find a means of enforcing the judgment. Developing and imposing civil remedies short of imprisonment will force the courts to search for innovative sanctions whose constitutionality may not have been tested. Hopefully, this burden on the courts will be balanced by a more flexible and rational treatment of minor offenses.

The violation category is new and unfamiliar to this jurisdiction and, as established in the Code, not yet totally flawless. But it meets an increasingly pressing demend of the courts, the legislature and the public for a means of control which is flexible yet effective, restrictive but not Procrustean. With the inclusion of some additional provisions to bolster and clarify this new classification and its enforcement, the violation category could become one of the most beneficial and useful sections of the Proposed Code.

II. PRINCIPLES OF LIABILITY AND RESPONSIBILITY

A. Actus Reus and Mens Rea

The Proposed Code codifies the basic principle that the *minimal* requirement for criminal liability is a *voluntary* act or omission.[33]

31. R.W.C.C. § 9A.20.020(4)(c).

32. 401 U.S. 395 (1971). In *Tate* the Supreme Court held that it is unconstitutional to automatically convert the failure of an indigent to pay a fine to a term of imprisonment under a statute authorizing a fine as the only penalty.

33. R.W.C.C. § 9A.08.010 provides in full:

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or an omission to perform an act of which he is physically capable.

(2) The possession of property is a voluntary act if the actor was aware of his physical possession of such property or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

(3) For purposes of this section:

This requirement excludes all involuntary acts such as reflex actions, acts committed during hypnosis, epileptic fugue, unconsciousness[34] or sleep, and failure to perform an act which the actor is physically incapable of performing.[35] This treatment is consistent with accepted principles of criminal jurisprudence[36] and appears to conform to existing Washington law.[37]

The Code provides that possession of property constitutes a voluntary act if the actor was sufficiently aware of his control over the property to have been able to terminate his possession.[38] Although one may legally possess something without knowing of its existence for purposes other than the criminal law,[39] possession in the criminal law usually means conscious possession.[40] This knowledge of possession

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(a) "voluntary act" means a bodily movement performed consciously as a result of the actor's effort or determination; and

(b) "omission" means a failure to perform an act as to which a duty of performance is imposed by law.

The term "omission" has not been defined by a Washington court.

34. Unconsciousness or automatism is a defense sometimes confused with criminal insanity. Some cases suggest that one who is "unconscious" or "semi-conscious" when he acts is not criminally liable because he lacks the requisite mental state for the crime charged. However, the better rationale is that when one acts "unconsciously" or "semi-consciously," he is not acting "voluntarily." While few cases involving automatism have been decided in the United States, those that have been decided support automatism as a defense to crime. W. LAFAVE & A. SCOTT, CRIMINAL LAW 337 (1972). The defense is raised with much greater frequency in Great Britain. The unconsciousness or automatism defense is available even when an accused is not suffering from a "mental disease or defect." Ellis v. United States, 274 F.2d 52 (10th Cir. 1959); Carter v. State, 376 P.2d 351 (Okla. Crim. 1962). *See* Edwards, *Automatism and Social Defense*, 8 CRIM. L.Q. 258 (1966); Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 CALIF. L. REV. 645 (1963); Williams, *Automatism*, in ESSAYS IN CRIMINAL SCIENCE (Mueller ed. 1961).

35. *See* M.P.C. § 2.01(2) and Comment (Tent. Draft No. 4, 1955). Also excluded is the case in which one person physically forces another person into bodily movement. For example, where A by force causes B's body to strike C, the act by B is not voluntary.

36. *See, e.g.*, R. PERKINS, CRIMINAL LAW 546 (2d ed. 1969) [hereinafter cited as PERKINS]; J. SALMOND, JURISPRUDENCE 400 (11th ed. 1957); O. HOLMES, THE COMMON LAW 46 (Howe ed. 1963); G. WILLIAMS, CRIMINAL LAW 17-18 (2d ed. 1961); W. LAFAVE & A. SCOTT, CRIMINAL LAW 179-181 (1972); and M.P.C. § 2.01, Comment (Tent. Draft No. 4, 1955).

37. *See* State v. Carter, 4 Wn. App. 115, 479 P.2d 544 (1971).

38. R.W.C.C. § 9A.08.010(2).

39. *See, e.g.*, South Staffordshire Water Co. v. Sharman, [1896] 2 Q.B. 44, where the court held that a landowner enjoyed possession of a ring in a pool on his land, and was entitled to the ring as against the person who found it in his pool even though the landowner did not know of its existence. *See also* Elliott v. Bowman, 17 Mo. App. 693 (1855).

40. *See, e.g.*, Baender v. Barnett, 255 U.S. 224 (1921); United States v. Sawyer, 294 F.2d 24 (4th Cir. 1961); and Durfee v. Jones, 11 R.I. 588, 23 Am. R. 528 (1877). It has been held that the legislature cannot make unconscious possession the basis of a crime. State v. Labate, 7 N.J. 137, 80 A.2d 617 (1951).

requires only awareness of the physical object and not perception of its special qualities.[41] For example, one may be in possession of heroin, although he believes the substance to be sugar. The emphasis placed on "control" in the Code's provision is consistent with existing Washington law.[42]

Implicit in the stated purposes of the Proposed Code is a desire to eliminate the ambiguity and confusion inherent in the current descriptions of many criminal offenses.[43] The primary source of this obscurity lies in the failure of the existing criminal code to define some mental states and to clearly define others.[44]

The Proposed Code, following the lead of the American Law Institute and several other states,[45] seeks to eliminate this difficulty by

41. M.P.C. § 2.01, Comment (Tent. Draft No. 4, 1955); G WILLIAMS, CRIMINAL LAW § 6 (2d ed. 1961).

42. In State v. Jones, 114 Wash. 144, 148, 194 P. 585, 587 (1921), the Washington Supreme Court defined "possession as including control of the thing possessed. . . ." *Accord,* State v. Henker, 50 Wn.2d 809, 314 P.2d 645 (1957). The emphasis on "control" is important because it contemplates the union of two elements: physical power over the object and the intent to control it. Keron v. Cashman, 33 Atl. 1055 (N.J. 1896). Physical power without intent distinguishes possession from custody. *See generally* R. BROWN, THE LAW OF PERSONAL PROPERTY 19-22 (2d ed. 1955); W. HOLMES, THE COMMON LAW, 163-194, (Howe ed. 1963); and J. SALMOND, JURISPRUDENCE 265-298 (12th ed. 1966).

43. R.W.C.C. § 9A.04.020.

44. For example, whether an accused is guilty of murder in the first or second degree under existing law turns on whether he killed with premeditation. Killing "[w]ith a premeditated design to effect . . . death . . ." is first degree murder while a killing "[c]ommitted with [only] a design to effect . . . death . . ." is murder in the second degree. WASH. REV. CODE § 9.48.030-.040 (1959). One would expect the distinction between first and second degree murder to be clear and precise. It is not. The Washington Supreme Court has approved jury instructions which defined premeditation to mean: "thought over beforehand, for any length of time, however short. . . . (no particular space of time, however, need intervene between the formation of the intent to kill and the killing)." State v. Blaine, 64 Wash. 122, 128-29, 116 P. 660, 665 (1911). This renders the distinction between the two degrees of murder "quite indistinguishable." Wechsler and Michael, *A Rationale of the Law of Homicide* 37 COLUM. L. REV. 701, 709 (1937). *See also* Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime,* 56 YALE L.J. 959, 974 (1947). This same distinction between "design" and "premeditated design" prompted Mr. Justice Cardozo to remark:

> The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books.

B. CARDOZO, LAW AND LITERATURE 101 (1930). Another example is the term "malice." It is often employed in the definition of criminal offenses but its meaning has caused considerable confusion. See M.P.C. § 2.02, Comment (Tent. Draft No. 4, 1955). WASH. REV. CODE § 9.01.010(3) (1959) defines "malice" and "maliciously" to mean "an evil intent, wish or design to vex, annoy or injure another person." Professor Perkins notes that proof of malice "requires something more than criminal negligence" but that "there has been some difficulty in expressing just what is needed in this regard." PERKINS at 768.

45. *See, e.g.,* ILL. ANN. STAT. ch. 38, § 4-4 to 4-7 (Smith-Hurd 1972); N.Y. PENAL LAW § 15.05 (McKinney 1967); MICH. REV. CRIM. CODE § 305 (Final Draft 1967).

employing four carefully defined levels of mens rea. In descending order of culpability the four levels are: intent, knowledge, recklessness and criminal negligence. To alleviate a source of inequity in our present criminal law, a special effort has been made to distinguish the concept of criminal negligence from ordinary civil negligence.[46] The Proposed Code also includes a precise definition of the term "wilful" in order to provide a guide for the application of the Code's mental state requirements to criminal offenses outside Title 9 of Washington's Revised Code.[47]

The Code establishes a presumption that every offense, including those not repealed by the Proposed Code,[48] requires one of the four mental states described. This presumption can be rebutted only by a clear "legislative intent to impose absolute liability."[49] By alleviating the harshness and inequity connected with absolute liability offenses, this provision reflects the modern trend.[50] The Code makes the culpability requirement an "element of the offense"[51] which the state must prove beyond a reasonable doubt.[52]

R.W.C.C. § 9A.08.020(3) seeks to eliminate the difficulties of applying the mens rea requirements to different elements of a crime. This section provides that when the definition of a crime refers to a single level of mens rea, that level will apply to all material elements of the crime "in the absence of a clear statutory mandate to the contrary."[53] However, an offense may expressly require different mens rea requirements for different elements of the crime.[54] Where the de-

46. Under WASH. REV. CODE § 9.48.060 (1959), a defendant may be convicted of manslaughter on the basis of ordinary negligence, State v. Brubaker, 62 Wn.2d 964, 385 P.2d 318 (1963), but if he is fortunate enough to be driving an automobile when he kills another, the prosecution must establish more than ordinary negligence; aggravated negligence must be proven. WASH. REV. CODE § 46.61.520 (1959). State v. Eike, 72 Wn.2d 760, 435 P.2d 680 (1967). Thus whether a defendant must serve a prison sentence hinges, in part, on the arbitrary distinction between killing another while driving or not driving a car.

47. R.W.C.C. § 9A.08.020(6) provides:

A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

48. R.W.C.C. §§ 9A.04.050(2), 9A.08.050.

49. R.W.C.C. § 9A.08.050.

50. PERKINS at 808. See also Force, *Criminal Law and Procedure,* 35 N.Y.U.L. REV. 1430 (1960), and Mueller, *Criminal Law and Administration,* 34 N.Y.U.L. REV. 83, 88 (1959).

51. R.W.C.C. § 9A.04.130(9)(a).

52. R.W.C.C.§ 9A.04.120(1).

53. R.W.C.C.§ 9A.08.020, Comment.

54. For example, R.W.C.C. § 9A.48.040 reads: "(1) A person is guilty of reckless burning if he intentionally causes a fire or explosion, whether on his own property or the

gree of the offense is determined by the level of culpability established, a defendant can be convicted of only that degree which includes the lowest level of culpability established for any material element of the offense.[55]

Since the concept of applying clearly defined levels of culpability to material elements of a crime is new to Washington law, it is difficult to ascertain the effect this rule will have upon existing law. The only obvious effect is to resolve ambiguity in some statutes and encourage a more explicit definition of the elements of an offense in all criminal statutes.[56] This resolution probably benefits the accused, since the prosecution is given clearly defined burdens of proof to replace ambiguities prone to presumptive evidence and questionable inferences.

At first glance, it appears that the new mens rea requirements do not depart significiantly from current law. The definitions of the four mental states described in the Code are deceptively similar to current definitions. It is true, as the drafters note,[57] that the full impact of the proposed culpability requirements can only be ascertained from a comparison of particular offenses under the present and proposed criminal codes. Although space limitation precludes such comparisons here,[58] a few generalizations can be gleaned from an analysis of the proposed culpability requirements.

1. Intent

A survey of offenses in the Proposed Code reveals that most crimes require proof of intent. "Intent" under the Proposed Code is defined in terms of what is presently known as specific, not general, intent.[59]

property of another, and thereby recklessly places a building of another in danger of destruction or damage." Two mental states are required for conviction of this offense, intent and recklessness. The actor must intend to cause a fire or explosion, but need only recklessly endanger the building of another.

55. R.W.C.C. § 9A.08.020(5). *See* M.P.C. § 2.02, Comment at 131-32 (Tent. Draft No. 4, 1955).

56. R.W.C.C. § 9A.08.020, Comment.

57. *Id.*

58. See however, the sections on the offenses against property, the offenses against persons, inchoate crimes and sexual offenses elsewhere in this comment.

59. A person intends or acts intentionally or with intent to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish such a result or to engage in conduct of that nature. R.W.C.C. § 9A.08.020(2)(a). Salmond indicates that criminal intent may be one of two types: general or specific. J. SALMOND, JURISPRUDENCE 367 (12th ed. 1966). Perkins offers helpful definitions distinguishing the two. General intent is simply "an intent to do the deed which constitutes the *actus reus* of the very crime . . . ." PERKINS at 744. Specific

The proposed definition of intent increases the evidentiary burden placed upon the prosecution, for the prosecution will no longer be able to rely upon the inference of intent that may be drawn from the commission of the illegal act.[60] Contrasting the evidentiary requirements for specific and general intent, the court in *State v. Louther* stated:[61]

> The applicable rule is that where a specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act.

In a later case,[62] the court held that circumstantial evidence may sustain an inference of specific intent only when it is supported "as a matter of logical probability."[63] Although the Proposed Code's intent requirement precludes application of the presumption that one intends the natural and probable consequences of his acts,[64] it does not preclude logical inferences drawn from circumstantial evidence.

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intent is defined as "some intent other than to do the actus reus thereof which is specifically required for guilt," *e.g.*, the intent to steal in larceny and the intent to commit a crime in burglary. *Id.* at 762.

The drafters of the Proposed Code, in discussing the definition of "intent" under the Proposed Code, state: "Probably the closest equivalent in Washington law to the new definition is the rather imprecise phrase 'specific intent,' which seems similar in effect to the new term." R.W.C.C. § 9A.08.020, Comment.

60. This is because the inference of intent drawn from the commission of the illegal act applies only to general intent crimes. Because general intent is not an adequate *mens rea* under the Proposed Code, it follows that the inference will no longer have vitality.

61. 22 Wn.2d 497, 502, 156 P.2d 672, 674 (1945).

62. State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968).

63. *Id.* at 289, 438 P.2d at 195; *accord*, State v. Leach, 36 Wn.2d 641, 646, 219 P.2d 972, 976 (1950).

64. State v. Louther, 22 Wn.2d 497, 502, 156 P.2d 672, 674 (1945); PERKINS at 764. The presumption that one intends the natural and probable consequences of his acts has been highly criticized by some scholars. The presumption is believed to seriously undermine the concept of mens rea, and to apply principles of tort negligence to criminal liability. Professor Williams says of the presumption:

> This maxim, though many judges are fond of it, contains a serious threat to any rational theory of intention. It is not true in fact that a man necessarily intends the natural . . . consequences of his acts. . . . [T]here are some ways in which the maxim has had a positive and objectionable effect upon the law. It has resulted in defamation and sedition being treated in some cases as crimes of negligence, or even of strict liability. . . . The other crime adversely influenced by the maxim is the gravest in the ordinary criminal calendar: murder.

G. WILLIAMS, CRIMINAL LAW 89-93 (2nd ed. 1961). *See also*, Ashford and Risinger *Presumptions, Assumptions, and Due Process, in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1970).

2. *Knowledge*

As the term "knowledge" is currently defined,[65] a jury may infer knowledge by a defendant if an "ordinary prudent man" would have such "knowledge." This presently permits a jury to find knowledge in cases where the defendant has been no more than reckless or criminally negligent under the terminology of the Proposed Code.[66]

The Proposed Code replaces this objective "ordinary prudent man" standard with a subjective standard requiring an "awareness" by the defendant that: (1) his conduct is "substantially certain" to cause a result; or (2) his conduct is unlawful; or (3) criminal circumstances exist; or (4) there is a "high probability" that a particular fact exists.[67] In discarding the existing "ordinary prudent man" standard, the Proposed Code reduces criminal liability predicated upon "knowledge" to the extent that recklessness or criminal negligence presently sustain an inference of knowledge.[68]

3. *Recklessness*[69]

Recklessness as a basis for criminal liability is, for the most part, new to Washington law. However, traces of the concept can be found in at least three statutes. First, the reckless driving statute[70] refers to recklessness as a "willful or wanton disregard for the safety of persons or property;" second, the vehicular homicide statute[71] imposes liability where death results from "the operation of . . . any vehicle in a

65. WASH. REV. CODE § 9.01.010(4) (1959). The word "knowingly" imports a knowledge that the facts exist which constitute the act or omission of a crime, and does not require knowledge of its unlawfulness; knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent man upon inquiry.

66. *See, e.g.*, State v. Tembruell, 50 Wn.2d 456, 312 P.2d 809 (1957).

67. R.W.C.C. § 9A.08.020(2) (b).

68. Under the proposed statute, the accused must have an actual awareness of such facts constituting the act or omission of a crime. Under the current statute, an actual awareness is not required. It is sufficient to infer guilty knowledge if the accused was negligent or reckless in not being aware of such facts. *See* PERKINS at 779; *see also* State v. Tembruell, 50 Wn.2d 456, 312 P.2d 809 (1957).

69. R.W.C.C. § 9A.08.020(2)(c) provides:

> A person is reckless or acts recklessly when he knows of and consciously disregards a substantial and unjustifiable risk (i) that the result described by a statute defining an offense may occur, or (ii) that a circumstance described by a statute defining an offense exists, and when the disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would exercise in the situation.

70. WASH. REV. CODE § 46.61.500 (1967).

71. WASH. REV. CODE § 46.61.520 (1970).

reckless manner;" and third, the first degree murder statute[72] predicates criminal liability on "an act imminently dangerous to others and evincing a depraved mind, regardless of human life . . . ." Insofar as these three statutes confer liability upon those who disregard known risks, they indicate that current law recognizes "recklessness" as a basis for criminal liability.

4. Criminal Negligence

Negligence as a basis of criminal liability is presently defined by statute in terms of ordinary civil negligence.[73] The Proposed Code alters this definition significantly. Criminal negligence under the Proposed Code requires a "gross deviation" from a reasonable standard of care.[74] The reasons for this change are twofold. First, since a negligent person is inadvertent by definition, the "threat of punishment for negligence must pass him by, for he does not realize that it is addressed to him."[75] Second, criminal punishment should be reserved for grossly deviant conduct, not the ordinary deviation for which civil remedies are adequate.

The primary impact of this change will be felt in the homicide statute. Currently, "ordinary, as distinguished from aggravated or gross, negligence will support a conviction of manslaughter . . . ."[76] The Proposed Code precludes conviction of homicide unless gross negligence is proven.[77]

Although the proposed definition of criminal negligence changes existing law, it does bring consistency into the law of negligent homi-

72. WASH. REV. CODE § 9.48.030(2) (1959).

73. WASH. REV. CODE § 9.01.010(1) (1959) states: "Each of the words 'neglect,' 'negligence,' and 'negligently' shall import a want of such attention to the nature or probable consequences of an act or omission as an ordinarily prudent man usually exercises in his own business."

74. R.W.C.C. § 9A.08.020(1) (d) provides:

> A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial and unjustifiable risk (i) that the result described by a statute defining an offense may occur, or (ii) that a circumstance described by a statute defining an offense exists, and the failure to be aware of such risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation.

75. G. WILLIAMS, CRIMINAL LAW 99 (1953); *accord,* M.P.C. § 2.02, Comment (Tent. Draft No. 4, 1955).

76. State v. Brubaker, 62 Wn.2d 964, 966, 385 P.2d 318, 319 (1963).

77. Criminally negligent homicide is the lowest degree of homicide recognized in the Proposed Code. R.W.C.C. § 9A.32.050 provides: "(1) A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."

cide. While ordinary negligence is sufficient to support a conviction of manslaughter under present law, it is not sufficient to support a conviction of negligent homicide by motor vehicle. In construing the vehicular homicide statute,[78] the Washington Supreme Court has held that "ordinary negligence will not support a conviction of negligent homicide."[79] Rather, what must be shown is "an aggravated kind of negligence or carelessness."[80] This essentially constitutes what the Proposed Code defines as "criminal negligence." The rationale of the Washington Legislature in requiring proof of gross negligence for conviction under the vehicular homicide statute is an equally persuasive rationale for requiring such proof in the general criminal law.[81]

A criminal negligence standard also is utilized in some of the affirmative defenses specified in the Proposed Code. Some affirmative defenses require a "reasonable belief" by the accused before they can be invoked. A "reasonable belief" under the Proposed Code is one "which the actor is not reckless or criminally negligent in holding;"[82] thus, if the defendant is negligent (but not grossly negligent) in holding a particular belief, such a belief would be "reasonable" under the Code. This definition of reasonable belief marks a change in existing Washington law. Washington, like other jurisdictions,[83] previously has defined a reasonable belief as a belief honestly held by the defendant, one that a reasonable person would hold under the same circumstances.[84] The prevailing requirement that a reasonable man standard be met suggests that if a belief is negligently held, it is not a reasonable belief under current Washington law. Professor Williams contends that a negligently held belief has been deemed an unreasonable belief only in cases where negligence is the degree of culpability required for conviction.[85] Thus he concludes that it is repeti-

78. WASH. REV. CODE § 46.61.520 (Supp. 1971) (negligent homicide by use of a motor vehicle).

79. *See* State v. Eike, 72 Wn.2d 760, 435 P.2d 680 (1967); *accord,* State v. Brooks, 73 Wn.2d 653, 440 P.2d 199 (1968); State v. Collins, 55 Wn.2d 469, 348 P.2d 214 (1960); State v. Partridge, 47 Wn.2d 640, 289 P.2d 702 (1955).

80. State v. Eike, 72 Wn.2d 760, 435 P.2d 680 (1967).

81. The Washington Legislature apparently wished to exclude from the criminal sanction the hundreds of minor oversights and inadvertences encompassed within the term "negligence." *See* State v. Eike, 72 Wn.2d 760, 435 P.2d 680 (1967).

82. R.W.C.C. § 9A.04.130(22).

83. *See* PERKINS at 940.

84. State v. Churchill, 52 Wash. 210, 100 P. 309 (1909).

85. G. WILLIAMS, CRIMINAL LAW § 71 (2d ed. 1961). Professor Williams suggests elsewhere that ordinary negligence is not a proper base from which to invoke the criminal law. *Id.,* § 43.

tious to say that a negligently held belief is an unreasonable belief. All that is really being said is that negligent conduct will support a conviction.

If ordinary negligence will not support criminal liability directly, it should not support it indirectly by precluding the utilization of defenses by an accused who has not been grossly negligent. The Code's definition of reasonable belief is analytically consistent with the treatment of negligence throughout the Proposed Code. The real change in Washington law lies not in the proposed definition of reasonable belief but in the abolition of ordinary negligence as a basis for criminal liability.

The careful use of the uniform standards should be of assistance to both judge and jury. The definitions of the four mental states, are, of course, too "legalistic" to aid the jury directly, but the uniform application of these terms throughout the criminal code should aid the courts in relating the law to the facts of a particular case. Hopefully, this will lead to greater jury understanding of the judge's instructions and fewer appeals to determine the meaning of a particular mens rea.

B. Offenses With No Express Mental State Requirement

R.W.C.C. § 9A.08.050 provides that absent "a legislative intent to impose absolute liability," an offense which does not expressly include one of the four defined mental states shall be "construed" to include one of these defined mental states. The Proposed Code contains twenty-three offenses which do not include in their definitions one of the four defined mental states. Of these twenty-three, seven explicitly designate culpable mental states other than one of those described in the Code. Two of these seven offenses require that the defendant act for the purpose of accomplishing a particular result.[86] Acting for a purpose seems synonomous with acting intentionally.[87] The other five

86. R.W.C.C. §§ 9A.84.060 (loitering), 9A.88.015 (communication with a minor for immoral purposes). *See* State v. Rahn, 1 Wn. App. 159, 459 P.2d 824 (1969).

87. The Model Penal Code defines "purposely" in a similar manner to the Proposed Code's definition of intent. M.P.C. § 2.02(2) (a) (i). It is puzzling why the drafters did not use the word "intent" in the two statutes. The word "intent" could very easily be substituted for the word "purpose" without changing the apparent meaning of the two statutes. That the drafters failed to do so clouds the meaning of the two statutes by raising the possibility that "purpose" means something other than "intent."

statutes require that the defendant act with a prescribed belief.[88] Where the statute requires that the accused believe a fact exists, the mental state of knowledge must be satisfied.[89] Where the statute requires that the accused not believe in the existence of a fact, the mental state requirement will not be met if the accused was reckless in failing to know if the fact existed.[90]

The sexual offenses do not include a specific mental state requirement in their definitions.[91] However, two sexual offenses can be committed if the defendant obtains sexual intercourse by "forcible compulsion."[92] Forcible compulsion is defined in such a way as to "necessarily involve" a mental state requirement.[93] Moreover, it is an affirmative defense that the accused reasonably believed the victim to be of consenting age,[94] or that he believed "the circumstances giving rise to . . . incapacity to consent [*i.e.*, a mental defect, mental incapacitation, or physical helplessness] were not present."[95] This means that although the prosecution's prima facie case does not include proof of a culpable mental state, the accused can, by evidence, place his culpability in issue. Thus the implicit mental state requirements of the sexual offenses are derived from the affirmative defenses to the offenses and the definition of "forcible compulsion."

Eight offenses in the Proposed Code neither contain a mental state requirement in their definition nor provide affirmative defenses from

88. R.W.C.C. §§ 9A.72.010 (perjury in the first degree), 9A.72.030 (false swearing), 9A.72.060 (bribe receiving by a witness), 9A.72.070 (intimidating a witness), 9A.72.080 (tampering with a witness).

89. M.P.C. § 208.20, Comment 4 (Tent. Draft No. 6, 1957). For example, the crime of false swearing (R.W.C.C. § 9A.72.030) requires a person to make "a false statement, which he believes to be false . . . ." This requires that a person make a statement which he *knows* to be false.

90. "A person can be convicted if he makes a false statement without any belief in the matter, *i.e.*, reckless whether it be true or false." M.P.C. § 208.20, Comment (Tent. Draft No. 6, 1957). For example, first degree perjury requires that a person make a false statement "which he does not believe to be true . . . ." R.W.C.C. § 9A.72.010.

91. R.W.C.C. ch. 9A.44.

92. R.W.C.C. §§ 9A.44.030, .070.

93. R.W.C.C. § 9A.44.005(7). Forcible compulsion is defined to include "physical force that overcomes earnest resistance" or express or implied threats that place the victim in fear that either he or another person will be killed, injured, immediately kidnapped or unlawfully imprisoned. If physical force or express threats are employed to secure intercourse, an intent to accomplish the proscribed result necessarily is involved. If implied threats are employed, the accused at least must be "substantially certain" *(i.e., know)* that his conduct will cause the victim to submit involuntarily to intercourse.

94. R.W.C.C. § 9A.44.020(2)(b).

95. R.W.C.C. § 9A.44.020(1).

which a mental state requirement can be derived.[96] A difficult question then arises as to whether this evidences a clear legislative intent to impose absolute liability or whether a standard can be constructed from which a mental state requirement can be construed. A useful solution suggested by the Michigan and New York codes is that "a culpable mental state . . . may be required for commission of that offense . . . if the proscribed conduct *necessarily involves* such a culpable mental state."[97] This approach provides a framework which the courts may use to solve the mental state question inherent in these eight offenses[98] as well as the two sexual offenses discussed above.[99] Three of these eight offenses require that an act be performed pursuant to an agreement or understanding.[100] One offense requires that an act be performed "in return for a fee."[101] Performing an act "in return for a fee" implies a prior understanding or agreement. Since a contemplated purpose or design is inherent in an understanding or agreement, this provision seems to imply that one who acts pursuant to an agreement or understanding must act intentionally.

Escape is another crime that "necessarily involves" a mental state requirement. Implicit in the word "escape" is an intent to flee and elude official detention, an intent which is manifest in most escape situations.[102] Thus the Code seems to require proof of an intent to flee and elude official detention as a predicate to conviction for escape.[103]

The mandate of the Code indicates a strong preference against absolute liability crimes. However, without either a section comparable to the Model Penal Code provision which expressly imposes a culpability requirement where a mental state is not otherwise specified[104] or

96. R.W.C.C. §§ 9A.68.040 (trading in public office), 9A.76.080 (compounding), 9A.76.090 (escape in the first degree), 9A.76.100 (escape in the second degree), 9A.76.110 (escape in the third degree), 9A.84.050 (public intoxication, *but see* note 661 and accompanying text *infra*), 9A.88.020 (prostitution), 9A.88.030 (patronizing a prostitute).

97. MICH. REV. CRIM. CODE § 315 (Final Draft 1967) (emphasis added); *See also* N.Y. PENAL LAW § 45.05 (McKinney 1967).

98. *See* note 96 and accompanying text *supra*.

99. *See* note 92 *supra*.

100. R.W.C.C. §§ 9A.69.040 (trading in public office), 9A.76.080 (compounding), 9A.88.030 (patronizing a prostitute).

101. R.W.C.C. § 9A.88.020 (prostitution).

102. M.P.C. § 208.33, Comment (Tent. Draft No. 8, 1958).

103. *Id.*

104. M.P.C. § 2.02(3) (Tent. Draft No. 4, 1955) reads as follows: "When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto."

a provision which supplies an analytic framework from which the courts may derive the appropriate culpability requirement,[105] R.W.C.C. § 9A.08.050 may present practical problems of construction, especially for crimes located outside the Code.

C. *Mistake of Fact and Mistake of Law*

Directly relevant to the principles of liability established by the Code's mental state requirements is the Code's determination of when mistake of fact or law exculpates the accused. Under the Proposed Code, mistake of fact constitutes an affirmative defense in three instances: (1) when it negates the mental state which is an essential element of the crime;[106] (2) when the statute defining the offense expressly provides that such factual mistake constitutes a defense or exemption;[107] and (3) when the mistake supports a defense of justification.[108]

A potential conflict exists between the mistake of fact provision and some affirmative defenses. Although R.W.C.C. § 9A.08.040(1)(a) provides that a mistake of fact is a defense if it negates the mental state requirement of a particular offense, the provision includes no requirement that the mistake be reasonable. On the other hand, some affirmative defenses relevant to whether a mistake of fact negated the accused's culpability do require that the mistake be reasonable.[109] Under which provision may the accused assert his mistake of fact defense? If he asserts the mistake of fact defense provided by R.W.C.C. § 9A.08.040(1)(a), he need only demonstrate the honesty of his mistake; whether it was reasonable is irrelevant. However, if he is allowed to proceed only under a specific affirmative defense, he may have to demonstrate that his mistake was reasonable as well as honest.[110]

Two analyses may resolve the potential inconsistency. The first is grounded in the fundamental rule of construction that where a conflict

105. See note 96 and accompanying text *supra*.
106. R.W.C.C. § 9A.08.040(a).
107. R.W.C.C. § 9A.08.040(1)(b).
108. R.W.C.C. § 9A.08.040(1)(c). See also the section on justification in this comment.
109. *See, e.g.*, R.W.C.C. § 9A.64.010(2)(a), which provides that a reasonable belief that the prior spouse was dead is an affirmative defense to a charge of bigamy.
110. Arguably the difference is only academic. Professor Cosway contends that any unreasonable mistake is ipso facto a dishonest mistake. See the discussion of this point in his article, at p. 77 of this volume.

in language exists, the more specific language will control. Thus where the language of an affirmative defense conflicts with R.W.C.C. § 9A.08.040(1)(a), the affirmative defenses, having a more specific application, will control.[111]

An alternative analysis is grounded in R.W.C.C. § 9A108.020(3), which provides:

> When a statute defining an offense prescribes as an element thereof a specified mental state, such mental state is deemed to apply to every material element of the offense *unless an intent to limit its application clearly appears*. (emphasis added).

Thus, whenever an offense requires proof of intent, knowledge or recklessness, an honest, albeit unreasonable, mistake of fact normally would be relevant to whether the accused acted culpably with respect to a material element of the offense. However, where a statute defining an offense provides that a reasonable mistake of a particular fact is an affirmative defense, the affirmative defense may be interpreted to indicate a legislative intent to limit the application of the mental state requirement as permitted by R.W.C.C. § 9A.08.020(3). According to this analysis, the prosecution would not need to prove that the accused acted culpably with respect to that particular fact until the issue is raised in connection with the affirmative defense.

Although the Proposed Code's treatment of mistake of fact is in harmony with the provisions of several other jurisdictions,[112] the Code departs somewhat from the general trend when it deals with mistake of law.[113] The Code is explicit in its retention of the common law rule that ignorance or mistake of law generally is not a defense.[114] This provision is not as inflexible as it might seem, however, because it is qualified by the phrase "unless otherwise provided," which acquires greater significance when read in conjunction with the Code as a whole.

In several instances the drafters specifically have provided that mistake of law affords a defense. Most significantly, the Code's section on

111. This analysis is consistent with R.W.C.C. 9A.08.040(1)(b), which makes specific reference to these affirmative defenses based on mistakes of fact.

112. *See* CONN. GEN. STAT. ANN. § 53a-6 (1971); REV. MICH. CRIM. CODE § 325 (Final Draft 1967); N.Y. PENAL LAW § 15.20 (McKinney 1967); and ILL. ANN. STAT. ch. 38, § 4-8 (Smith-Hurd 1972).

113. *See* note 122 and accompanying text *infra*.

114. R.W.C.C. § 9A.08.040(2).

execution of a public duty[115] permits justification as an affirmative defense whenever the actor reasonably believes that the law establishes a public duty which authorizes or requires the actor's conduct. This defense is the Code's most general exception to the mistake of law section, since the defense of justification based on execution of a public duty may be asserted in the prosecution for any offense,[116] except that it does not permit the use of force against any person unless that force is expressly authorized by law.[117] Narrower exceptions to the general mistake of law rule include the provision that a person using force to effect an arrest is justified if he reasonably believes that the force used is necessary to effect a *lawful* arrest.[118] A similar defense is available under the section governing custodial interference.[119] The Code also creates as affirmative defenses to the charge of bigamy both the actor's reasonable belief that he was legally free to remarry, and a court's entry of a judgment purporting to terminate any prior marriage if the actor did not know that such judgment was invalid.[120]

In contrast to this rational treatment of mistake of law in specific instances, the Proposed Code does not permit a defense of mistake of law when the accused has acted in reliance upon an official statement of the law later determined to be invalid or erroneous.[121] The Model

115. R.W.C.C. § 9A.16.030. While the comments which follow this section indicate the drafters believed it would provide only a "limited defense," the wording is open to a broad interpretation which would exculpate many persons acting under a reasonable but mistaken belief of law. Much of the uncertainty about the effect of the section could be removed by a clarification of the term "public duty."

For further discussion of R.W.C.C. § 9A.16.030 see the discussion of execution of public duty in the section on justification in this comment.

116. R.W.C.C. § 9A.16.010.

117. R.W.C.C. § 9A.16.030(2).

118. R.W.C.C. § 9A.16.070. *See also* the comment following this section at 84.

119. R.W.C.C. § 9A.40.050.

120. R.W.C.C. § 9A.64.010. Another affirmative defense is the actor's mistake of fact in reasonably believing his prior spouse to be dead. *Id.* The present law allows these exceptions to the crime of bigamy:

PROVIDED, That this section shall not extend to a person—

(1) Whose former husband or wife has been absent for five years exclusively then last past, without being known to him or her within that time to be living, and believed to be dead; or,

(2) Whose former marriage has been pronounced void, annulled or dissolved by a court of competent jurisdiction.

WASH. REV. CODE § 9.15.010 (1959). For a discussion of the bigamy provisions of the Proposed Code, see the section on bigamy in this comment.

121. *See* R.W.C.C. § 9A.08.040(2) and Comment following. It should be noted that R.W.C.C. § 9A.16.030(1)(d) justifies an act committed where the actor reasonably believed his conduct was required or authorized by "the judgment or order of a competent

Penal Code and numerous state codes provide for such a defense.[122] This severe restriction of the defense of mistake of law seems to implement a different philosophy concerning culpability than is evident in the Code's mens rea provisions. R.W.C.C. § 9A.08.050, in particular, refuses to impose absolute liability for an offense unless legislative intent clearly warrants it. In all other cases the accused must act with intent, knowledge, recklessness or criminal negligence.[123]

Furthermore, by omitting the defense of good faith reliance on an invalid official statement of the law, the Code has created an anomalous situation for many law-abiding citizens. Under Washington law, ignorance of a regulation will afford no defense for its violation;[124] yet under R.W.C.C. § 9A.08.040 a person is still vulnerable if he follows to the letter a statement of the law which is later found invalid. Where the actor's conduct cannot be deemed either culpable or blameworthy, little if any purpose can be served by imposing penal sanctions. Inflicting punishment for an act arising out of reliance on an official statement of the law can only breed disrespect and disregard for such statements and for the law itself. A provision allowing such a defense is warranted by a fundamental sense of fairness and is required if the Code's general philosophy of culpability is to be consistently applied.

III. THE DEFENSE OF CRIMINAL INSANITY

"No problem in the drafting of a penal Code presents larger intrinsic difficulty than that of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground

court or tribunal." This provision eliminates much of the hardship attendant to the Code's elimination of a defense based upon reliance upon an official statement of the law in the mistake of law section. However, this provision is of no avail to the actor who relies on an official statement of the law which emanates other than from a competent court or tribunal—*e.g.*, a written opinion of the state attorney general.

122. The Code rejects without explanation M.P.C. § 2.04(3)(b), which exculpates an actor who reasonably relies upon an invalid official statement of law. In doing so it differs from the codes of Connecticut, Michigan, New York and Illinois, all of which have followed the Model Penal Code in submitting this defense, *See* CONN. GEN. STAT. ANN. § 53a-6(b)(2) (1969); MICH. REV. CRIM. CODE § 325(2) (Final Draft 1967); N.Y. PENAL LAW § 15.20(2) (McKinney 1967); and ILL. ANN. STAT. ch. 38, § 4-8 (Smith-Hurd 1972).

123. R.W.C.C. § 9A.08.020.

124. State v. Turner, 78 Wn.2d 276, 474 P.2d 91 (1970) represents the current Washington law in this area:

> Many penal laws, for example, relating to pure food and drugs, labeling, weights and measures, building, plumbing and electrical codes, fire protection, air and water pollution, sanitation, highway safety and numerous other areas, in the

that they were suffering from mental disease or defect when they acted as they did."[125]

The Proposed Code's test of criminal insanity is a significant departure from current Washington law. The text of the proposed insanity test is:[126]

> (1) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either:
>
> (a) to know or appreciate the nature and consequence of such conduct; or
>
> (b) to know or appreciate the criminality of such conduct; or
>
> (c) to conform his conduct to the requirements of law.
>
> (2) Mental disease of defect excluding responsibility is an affirmative defense.

Currently, the definition of criminal insanity is not governed by statute; by default, the Washington Supreme Court has been given the task of formulating a definition. Since 1909[127] the M'Naghten Rule,[128] has been this state's test of legal insanity. However, the exact composition of the test is not easily gleaned from the cases. Confusion stems from the court's failure to approve a single formulation of the M'Naghten Rule.[129] Although M'Naghten is the rule followed by most

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exercise of the police power may be phrased and enforced as laws mala prohibita and may require neither proof of intent to do a wrong nor knowledge that a wrong will be done.

Id. at 280, 474 P.2d at 94.

125. M.P.C. § 4.01, Comment (Tent. Draft No. 4, 1955).

126. R.W.C.C. § 9A.12.010.

127. State v. Craig, 52 Wash. 66, 100 P. 167 (1909).

128. The M'Naghten Rule as originally formulated by Lord Chief Justice Tindol in response to five questions propounded by the House of Lords is:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 10 Cl. and F. 200, 208 8 Eng. Rep. 718, 722 (H.L., 1843).

129. The court, over the years, has approved three different formulations of the M'Naghten Rule. In most discussion of the M'Naghten Rule, the court has framed the test only in terms of whether the defendant "did not have the ability to distinguish between right and wrong with respect to the act charged." State v. Collins, 50 Wn.2d 740, 750, 314 P.2d 660, 666 (1957); State v. Craig, 52 Wash. 66, 100 P. 167 (1909). This formulation is taken from the second exculpatory branch of M'Naghten.

In a handful of Washington appellate opinions, the M'Naghten Rule is correctly stated—two exculpatory branches asserted in the disjunctive. Seattle v. Hill, 72 Wn.2d 786, 797, 435 P.2d 692, 700 (1968); State v. Nicholson, 1 Wn. App. 853, 854, 466 P.2d 181, 182 (1970). Framed in terms of criminal capacity as opposed to criminal insanity,

jurisdictions, it has been severely criticized by legal writers.[130] Unlike a number of states,[131] Washington repeatedly has refused to ameliorate M'Naghten with the "irresistible impulse" test.[132]

The proposed formulation is a remarkably good attempt to collect the best features of the M'Naghten, Durham,[133] irresistible impulse

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the formulation says that: "If one is capable of distinguishing between right and wrong and knows the nature and moral quality of his actions, he is deemed sane under the M'Naghten Rule . . . ." Seattle v. Hill, 72 Wn.2d 786, 797, 435 P.2d 692, 700 (1968).

However, in its most recent decision on the subject, the Washington court approved a jury instruction framing M'Naghten in the conjunctive:

> Is the mind of the accused so diseased or affected at the time of the commission of the act charged that he is unable to perceive the moral qualities of the act with which he is charged *and* is unable to tell right from wrong with reference to the particular acts charged.

State v. Reece, 79 Wn.2d 453, 454, 486 P.2d 1088, 1089 (1971) (emphasis added).

This writer believes that "to perceive the moral qualities of the act with which he is charged," is simply another way of asking if the defendant knew what he was doing. Professor Morris contends that the phrase modifies the right/wrong clause, and that the court is asking whether the defendant is unable to tell what is morally right from what is morally wrong. This writer rejects that view. If the court wanted to ask if the defendant could tell what is morally right from what is morally wrong, it could have done so in much simpler terms. Also, if the phrase read simply "to perceive the qualities of his act," there would be no doubt that the court was asking, "did the accused know what he was doing?" The key term "moral" seems only to ask if the defendant really appreciated the quality of his act; whether he fully understood the moral values involved. A jury instruction using a similar formulation of M'Naghten has been held reversible error in three jurisdictions: *see* State v. Moeller, 433 P.2d 136 (Hawaii, 1967); Knights v. State, 58 Neb. 225, 78 N.W. 508 (1899); and People v. Kelley, 302 N.Y. 512, 99 N.E.2d 552 (1951); *cf.* Chase v. State, 369 P.2d 997 (Alaska, 1962).

The M'Naghten Rule asserted in the conjunctive means that the accused must meet both exculpatory branches of the test and not just one. As Professor Morris points out, a conjunctive reading of the M'Naghten Rule severely narrows its application precluding it from applying to certain obvious cases of insanity: "A man might know the nature and quality of his act, but not know it was wrong. Conversely, a man might say that he knew his act was wrong, but he may not have appreciated its nature and quality when he did it." Morris, *Criminal Insanity,* 43 WASH. L. REV. 583, 601 (1968).

130. *See, e.g.,* J. ROCHE, THE CRIMINAL MIND 102 (Evergreen ed. 1959); Morris, *Criminal Insanity,* 43 WASH. LAW REV. 583 (1968); H. WEIHOFEN, THE URGE TO PUNISH (1956); *but see* Mueller, *M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity,* 50 GEO. L.J. 105 (1961); Livermore and Meehl, *The Virtues of M'Naghten,* 51 MINN. L. REV. 789 (1967).

131. For a list of states and federal circuits using M'Naghten and the "irresistible impulse" test, *see* A. GOLDSTEIN, THE INSANITY DEFENSE 236 n. 13, and 241 n. 1 (1967).

132. *See, e.g.,* In re White v. Rhay, 64 Wn.2d 15, 390 P.2d 535 (1964); State v. Maish, 29 Wn.2d 52, 185 P.2d 486 (1947).

Under the irresistible impulse rule jurors are instructed to acquit a defendant if they find that mental disease precluded him from controlling his conduct even if he is sane under the M'Naghten Rule. *See generally* Keedy, *Irresistible Impulse as a Defense in the Criminal Law,* 100 U. PA. L. REV. 956 (1952).

133. In 1954, the United States Court of Appeals for the District of Columbia promulgated the Durham Rule which simply let the jury determine: (1) whether the defendant was suffering from a mental disease or defect at the time he committed the crime, and if so, (2) whether the criminal act was the "product" of this mental disease or defect. "The rule . . . is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." Durham v. United States, 214

and Model Penal Code rules into a single test of criminal insanity, while avoiding each of their deficiencies. The first prong of the Proposed Code's insanity defense[134] is taken from the New York Criminal Code.[135] The purpose of the subsection is to permit the jury to find that those persons who know their conduct is wrong, but who do not fully appreciate the nature and consequences of such conduct, are not criminally responsible. Asking whether one appreciates the nature and consequence of his conduct "is an ordinary way of specifying what, in part at least, is meant by the psychiatrist's 'reality principle.' It concerns knowledge of ordinary actions and everyday consequences."[136] Simply put, it asks "whether the defendant *really* knew what he was doing."[137]

The Wisconsin Supreme Court offers a lucid explanation of the purpose and importance of inquiring whether a defendant knew the nature and consequence of his conduct:[138]

F.2d 862, 874-75 (D.C. Cir. 1954). Durham has received scant support among lawyers and lawmakers. To date, no American court has adopted the Durham test of legal insanity. Only two jurisdictions, Maine and the Virgin Islands, have adopted the standard by statute. *See* PERKINS at 877 n. 55. Even the District of Columbia no longer adheres to the rule. In United States v. Brawner, 11 Crim. Law Rptr. 2276 (June, 1972), the District of Columbia abandoned the Durham Rule in favor of the Model Penal Code formulation. Washington rejected the Durham Rule in State v. White, 60 Wn.2d 551, 374 P.2d 942 (1962).

Another test that should be mentioned is the "Currens Test." The Currens Test is essentially the second exculpatory branch of the M.P.C. rule:

> The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.

United States v. Currens, 290 F.2d 751, 774 (3rd Cir. 1961).

134. R.W.C.C. § 9A.12.010(1) states: "A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity . . . (a) to know or appreciate the nature and consequence of such conduct. . . ."

135. N.Y. PENAL LAW § 30.05 (McKinney 1967). But notice that this provision is not included in the Model Penal Code rule which provides:

> (1) A person is not responsible for criminal conduct if . . . as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

M.P.C. § 4.01.

136. J. HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY 281 (1958). *See also,* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 502-3 (1947).

137. PERKINS at 860 (emphasis added).

138. State v. Esser, 16 Wis. 2d 567, 115 N.W.2d 505, 521 (1962). For an example of a case in which a psychiatrist testified that the defendant knew that his act was wrong, but did not know the nature and quality of it, see People v. Samuels, 302 N.Y. 163, 96 N.E.2d 757 (1951).

> We think . . . that including the former element (nature and quality) gives important emphasis to one element of the realization of the wrongfulness of an act. Suppose that one vaguely realizes that particular conduct is forbidden, but lacks real insight into the conduct. He may be furtive about such conduct, but not really able to make a normal moral judgment about it.

Suppose, for example, a woman with a small child finds herself destitute and with little hope for the future. Believing that her child would be better off dead than living in misery, the woman chloroforms the child in its sleep. The woman probably knew what she was doing in the strict sense, and she probably knew that it was criminal. But what she lacked was "real insight" into the character and consequences of her act. She did not appreciate that she was snuffing out a human life and exactly what that meant. In short, she did not fully understand the nature and quality of her act.[139] Thus an important new dimension of culpability for the jury's consideration is added by the subsection.

The second prong of the proposed test is identical to the first exculpatory branch of the Model Penal Code rule.[140] Taken together, the first two prongs of the proposed rule constitute a modern counterpart to the M'Naghten Rule. The difference between M'Naghten and its modern counterpart lies in the latter's use of terms "substantial capacity" and "appreciate." Use of these terms avoids two of the major deficiencies of M'Naghten. Instead of requiring total impairment of intellectual cognition as does M'Naghten, the Code requires "substantial" impairment of either cognition or emotional appreciation.[141]

The third exculpatory prong of the Proposed Code's test,[142] is a control test which negates criminal responsibility where volition is substantially impaired. Under the control test, even if the accused appreciated the nature, consequence, and criminality of his conduct, he will not be held criminally responsible if as a result of a mental disease or defect he lacked the *will power* to resist committing a criminal act. Similar to the "irresistible impulse" test,[143] the proposed statute

139. *See* People v. Sherwood, 271 N.Y. 427, 3 N.E.2d. 581, (1936); H. SILVING, ESSAYS ON MENTAL INCAPACITY AND CRIMINAL CONDUCT 101 (1967).

140. *See* R.W.C.C. § 9A.12.010 (1)(b); M.P.C. § 4.01.

141. *See* A. GOLDSTEIN, THE INSANITY DEFENSE 87 (1967); Allen, *The Rule of The American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494, 501 (1962).

142. R.W.C.C. § 9A.12.010(1)(c) is identical to the second exculpatory branch of the Model Penal Code rule.

143. *See* note 132 *supra*.

will exclude from criminal sanction those individuals who are incapable of responding to the threat of criminal penalties, such as the kleptomaniac and the pyromaniac. This defense can be asserted in cases where either the act was sudden and unplanned or the crime was planned well in advance of its commission.[144] In the latter case the Code recognizes mental illnesses such as melancholia which are characterized by brooding and reflection and which substantially affect the actor's will power.[145] Thus the proposed rule allows the expert witness to present to the jury his full range of inquiry, while at the same time providing the jury with a standard to which they can apply the expert testimony.[146] The Code rejects the Model Penal Code's controversial section 4.01(2),[147] the purpose of which is "to exclude from the concept of 'mental disease or defect' the case of so-called 'psychopathic personality.' "[148] The framers of the Model Penal Code felt that the section was needed in order to prevent the insanity defense "from swallowing up the whole of criminal liability, as it might if all recidivists could qualify for the defense merely by being labeled psychopaths."[149] The section was disapproved by every psychiatrist on the American Law Institute staff.[150] Those who disfavor the section contend that it has no basis in psychiatric fact, *i.e.*, there are no persons with mental abnormalities manifested only by repeated criminal or otherwise anti-social conduct. Professor Goldstein explains:[151]

> [P]sychopathy is never "manifested only by repeated criminal . . . conduct. Psychiatrists—not just mountebanks, but the most honest ones—would invariably testify that any psychopath would show some

144. *See* A. GOLDSTEIN, THE INSANITY DEFENSE 70-71 (1967).
145. *Id.* at 71.
146. *See* United States v. Freeman, 357 F.2d 606, 623 (2d Cir. 1966).
147. M.P.C. § 4.01(2) states: "As used in this Article, the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."
148. M.P.C. § 4.01, Comment (Tent. Draft No. 4, 1955).
149. A. GOLDSTEIN, THE INSANITY DEFENSE 88 (1967); *See* Weihofen, *The Definition of Mental Illness,* 21 OHIO ST. L.J. 1, 6-7 (1960); Diamond, *From M'Naghten to Currens, and Beyond,* 50 CALIF. L. REV. 189, 193-94 (1962). *Cf.* Wechsler, *The Criteria of Criminal Responsibility,* 22 U. CHI. L. REV. 367, 374 (1955).
150. Diamond, *From M'Naghten to Currens, and Beyond,* 50 CALIF. L. REV. 189, 194 n.23 (1962).
151. A. GOLDSTEIN, THE INSANITY DEFENSE 88 (1967) (quoting Kuh, *A Prosecutor Considers the Model Penal Code,* 63 COLUM. L. REV. 608, 626 (1963)). *See also* United States v. Currens, 290 F.2d 751, 762 (3rd Cir. 1961); H. WEIHOFEN, THE URGE TO PUNISH 89-90 (1956); Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint,* 48 A.B.A.J. 527, 529 (1962); Weihofen, *The Definition of Mental Illness,* 21 OHIO ST. L.J. 1, 6-7 (1960).

other symptom of his psychopathy, even though his anti-social conduct might be the principal outcropping."

However, Dr. Bernard Diamond contends that the category defined in this section is "as arbitrary and capricious as excluding defendants with red hair or blue eyes or negro blood from the benefits of the law of criminal responsibility."[152]

The Proposed Code makes insanity an affirmative defense. This means that once some evidence of the defendant's insanity is presented, the prosecution bears the burden of persuading the jury beyond a reasonable doubt that the defendant was sane when he committed the unlawful act.[153] This is a departure from current Washington law which requires that the defendant prove his criminal insanity by a preponderance of the evidence.[154] The drafters felt that there is "no compelling reason . . . why the issue of moral responsibility—an element of every criminal offense—should be treated differently in terms of burdens of proof than all the other elements of the offense which generally have the burden of proof beyond a reasonable doubt placed upon the state."[155] Similar reasoning is followed in twenty-two states and in the federal system.[156] One state has held that due process and the reasonable doubt standard require this result.[157]

The Rule of Diminished Capacity

Conspicuous by its absence from the Proposed Code is an explicit provision on diminished capacity similar to that found in the Model Penal Code:[158]

Evidence that the defendant suffered from a mental disease or defect

152. Diamond, *From M'Naghten to Currens, and Beyond,* 50 CALIF. L. REV. 189, 194 (1962).

153. R.W.C.C. § 9A.04.120(2). *See also* Professor Cosway's discussion of this point at p. 67 of this volume.

154. State v. Tyler, 77 Wn.2d 737, 466 P.2d 120 (1970); State v. Bower, 73 Wn.2d 634, 440 P.2d 167 (1968); State v. Mays, 65 Wn.2d 58, 395 P.2d 758 (1964).

155. R.W.C.C. § 9A.12.010, Comment. For an excellent argument leading to this same conclusion, see Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases,* 77 YALE L.J. 880, 905 (1968).

156. *Annot.,* 17 A.L.R.3d 146, 158-9 (1964). Twenty-four states (including Washington) follow the preponderance of the evidence rule. *Id.* at 195-7.

157. People *ex rel.* Juhan v. District Court for Jefferson County, 439 P.2d 741 (Colo. 1968). In light of *In re* Winship, 397 U.S. 358 (1970), in which the Supreme Court gave constitutional status to the reasonable doubt standard, it may be that R.W.C.C. § 9A.12.010(2) is now constitutionally compelled.

158. M.P.C. § 4.02(1).

> is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

Washington is one of a growing minority of jurisdictions which have approved the rule of diminished capacity.[159] Relying upon dicta in an early Washington Supreme Court decision[160] the Washington Court of Appeals held in *State v. Carter* [161] that the rule of diminished capacity was part of this state's criminal law.[162] Given the emphasis placed upon an accused's mental state in the Proposed Code,[163] it is surprising that the drafters failed to expressly include the rule of diminished capacity. However, the rule appears to be incorporated implicitly by two sections of the Code. R.W.C.C. § 9A.04.120(1) requires that each element of an offense must be proved by competent evidence beyond a reasonable doubt to establish guilt, and R.W.C.C. § 9A.08.020(1) precludes conviction unless one of the four required mental states can be proved. Since R.W.C.C. § 9A.08.020(1) precludes conviction unless one of four required mental states can be proved, all evidence relevant to the issue of mens rea, including psychiatric evidence, is admissible to prove or disprove the existence of

159. To date at least eighteen jurisdictions, including Washington, have approved the rule of diminished capacity. Only four states have expressly rejected the rule. The remaining jurisdictions have yet to pass on the question. Brief of John M. Junker and Harvey H. Chamberlin as Amicus Curiae, at 12-13, State v. Carter, 5 Wn. App. 802, 490 P.2d 1346 (1971).

160. In State v. White, 60 Wn.2d 551, 588, 374 P.2d 942, 964 (1962), the Washington Supreme Court said, in dicta:

> The presence of a mental disease or defect which falls short of criminal insanity may well be relevant to issues involving the elements of degrees of certain crimes, *e.g.* where malice, premeditation or intent are in issue. An accused who has the necessary *capacity* to premeditate, for instance, may still introduce evidence that he is suffering from a mental disease or defect, which disease or defect substantially reduces the probability that he actually did premeditate with regard to the crime with which he is charged.

161. 5 Wn. App. 802, 490 P.2d 1346 (1971).

162. The court stated: "Any competent evidence which tends logically, naturally and by reasonable inference to prove or disprove a material issue is relevant and should be admitted unless it is specifically inadmissible by reason of some affirmative rule of law." *Id.* at 805, 490 P.2d at 1348. However, the court affirmed the conviction, stating:

> We find that the jury would necessarily have had to speculate on the effect which Mr. Carter's particular mental disorder, if present, would have had upon his ability to form an intent to commit the crime charged. There was no testimony to tie the alleged mental condition to the question of ability to form an intent. In the absence of that connecting link, the offer of proof was properly refused. Before testimony can be received into evidence, it must be shown to be relevant and material to the case.

Id. at 807, 490 P.2d at 1349.

163. *See, e.g.*, R.W.C.C. §§ 9A.08.020, (general requirements of culpability), 9A.08.040 (ignorance or mistake), 9A.08.080 (intoxication), 9A.12.010 (insanity).

mens rea.[164] In addition, to preclude an accused from introducing psychiatric testimony tending to negative the existence of an element of the offense conflicts with the requirement that the state prove every element of a crime beyond a reasonable doubt.[165]

IV. JUSTIFICATION

A. Justification Generally

The Proposed Code adopts the view that conduct otherwise proscribed by law is justified under certain limited circumstances. The justification chapter of the Code[166] includes the "choice of evils" theory of necessity and, in addition, specifies particular circumstances under which the use of force or the commission of otherwise illegal acts is justified.

The proposed "choice of evils"[167] section justifies "[c]onduct which the actor reasonably believes to be necessary to avoid a harm or evil to himself or to another. . . ."[168] This defense is subject to three significant limitations: (1) the harm sought to be avoided must be greater than that sought to be prevented by the law defining the offense charged,[169] (2) the law must not otherwise preclude the defense

164. "An accused should . . . always be able to assert that an element of the crime with which he has been charged was absent at the time he committed the act." S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 394 (rev. ed. 1971). In the comments to the Model Penal Code, The Chief Reporter stated:

> If states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence.

M.P.C. § 4.02(1), Comment (Tent. Draft No. 4, 1955).

165. The rule of diminished capacity may be constitutionally compelled now that the United States Supreme Court has given constitutional stature to the reasonable doubt standard. In *In re* Winship, 397 U.S. 358 (1970), the Court stated:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Id. at 364. If the defendant is not permitted to introduce evidence of mental impairment tending to negative the existence of an essential element of the crime charged, it cannot fairly be said that the state is proving "beyond a reasonable doubt . . . every fact necessary" to establish guilt. The prosecution in such instances is being aided by a conclusive presumption that mental impairment, not amounting to legal insanity, did not preclude the accused from acting with the mental state required of the offense charged.

166. R.W.C.C. ch. 9A.16.

167. R.W.C.C. § 9A.16.020.

168. R.W.C.C. § 9A.16.020(1).

169. This balancing of evils obviously is imprecise and by its very nature is a question best left to the jury for determination. For a discussion of this point see M.P.C. § 3.02, Comment at 5-6 (Tent. Draft No. 8, 1958).

of justification under the specific circumstances involved, and (3) the actor's determination as to the necessity for his conduct must be "reasonable."

The Code restricts the "choice of evils" defense of necessity to those instances where the law does not provide "exceptions or defenses dealing with the specific situation involved; and . . . a legislative purpose to exclude the justification claimed does not otherwise plainly appear."[170] Thus, the choice of evils analysis does not apply, for example, to the use of force in self-defense, because that situation is specifically dealt with under another section of the justification chapter.[171]

The requirement that the actor's evaluation as to the necessity for his conduct be reasonable[172] means that his choice must not be "criminally negligent."[173] Thus a mere negligent belief does not preclude successful assertion of the defense.[174] Where the defendant was either criminally negligent or reckless in evaluating the necessity for his conduct, he may be held liable only for an offense for which such criminal negligence or recklessness suffices to establish culpability.[175]

This section, unlike the Model Penal Code provision on which it is based, does not specifically cover the situation where the actor was reckless or criminally negligent in bringing about the situation requiring such conduct.[176] As the section is now drafted an actor who is reckless or criminally negligent in creating the situation making it

170. R.W.C.C. § 9A.16.020(1)(b) and (c).

171. *See* R.W.C.C. § 9A.16.020, Comment at 65.

172. This requirement of reasonableness exists not only in the "choice of evils" section but is applied throughout the justification chapter. For the Code's definition of "reasonable belief," see R.W.C.C. § 9A.04.130(22).

173. Criminal negligence requires a failure to be aware of a "substantial and unjustifiable risk" and such failure must constitute a "gross deviation" from the standard of care for a reasonable person. *See* R.W.C.C. § 9A.08.020(2)(d).

174. This result is consistent with the position of the Proposed Code that criminal liability should not be imposed for conduct that is merely negligent. *See* R.W.C.C. § 9A.08.020(2)(d) and Comments at 33-34.

175. R.W.C.C. § 9A.16.020(2). For example, where a person is criminally negligent in evaluating the necessity of engaging in proscribed conduct which is defined as requiring a mens rea of knowledge, he may not be convicted of the offense he commits. Instead, he may be convicted only of a lesser included offense for which the mens rea of criminal negligence suffices. If it happens that there is no such lesser included offense, he will be entirely exculpated.

176. M.P.C. § 3.02(2):

> When the actor was reckless or negligent *in bringing about the situation requiring a choice of evils* or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability. (emphasis added).

necessary to commit what would otherwise be an offense is completely exculpated so long as he reasonably believes his subsequent conduct to be necessary under the circumstances.[177] It is not clear that this is the result intended by the drafters, and, if it was not, the section should expressly provide that criminal negligence or recklessness in bringing about the situation requiring a choice of evils will satisfy the mens rea requirement for a subsequent offense requiring one of those degrees of culpability.

The Proposed Code treats justification as an "affirmative defense,"[178] meaning that once the defendant introduces evidence raising the defense the state has the burden of disproving it beyond a reasonable doubt. This treatment of the defense is consistent with present Washington law.[179]

B. Execution of a Public Duty

The Proposed Code justifies conduct pursuant to the execution of a public duty which the actor believes to be required or authorized by law.[180] This defense also is available to a private person rendering assitance to a public officer, notwithstanding the fact that the officer exceeded his legal authority. However, the use of force toward another person is not permitted by this provision unless such use of force is otherwise authorized by law.[181] Presently there is no statute in

177. A possible explanation of the proposed provision is that the mens rea existing with respect to conduct of an actor should apply only to that conduct and should not carry over to be applied to subsequently developing conditions. However, there might be situations in which it is deemed undesirable to allow the justification statute to exculpate entirely when it is the actor's negligent or reckless conduct which created the situation under which the choice of evils had to be made. For example, where one negligently creates circumstances under which it is likely that the deaths of A and B will result, and the actor makes a choice of evils so that he causes death to C by another means and thereby saves A and B, the justification statute will save him from being convicted of the intentional homicide. However, it is not clear whether he still will be guilty of negligent homicide under the Proposed Code. The New York formulation of the choice of evils doctrine is different from both the Model Penal Code and the Proposed Code. The New York code provides that the defense of justification is not available where the situation under which the choice was made was "occasioned or developed" through fault of the actor. *See,* N.Y. PENAL LAW § 35.05(2) (McKinney 1967), MICH. REV. CRIM. CODE § 605(1) (Final Draft 1967). This particular formulation is open to the criticism that a mere negligent act can result in prosecution for an intentional crime if the actor does respond to a choice of evils. Thus the actor would be discouraged from taking remedial action which would subject him to prosecution for a more serious offense.

178. R.W.C.C. § 9A.16.010(1).

179. *See* State v. Dunn, 22 Wash. 67, 60 P. 49 (1900).

180. R.W.C.C. § 9A.16.030.

181. R.W.C.C. § 9A.16.030(2). Thus the law enforcement officer who uses force

Washington on this subject, and no cases could be found relating precisely to this point.[182]

C. *Use of Force in Self-Protection*

The use of force toward another person is justifiable under the Code when the actor reasonably believes such force to be necessary to protect himself against the use of unlawful force by that other person.[183] This provision is generally consistent with present Washington law,[184] with two significant exceptions.

First, contrary to present law, the proposed justification defense is not available to the person who uses force to resist an unlawful arrest which he knows is being made by a police officer.[185] In *State v. Rousseau*[186] the Washington Supreme Court affirmed the validity of the use of force to resist an unlawful arrest, provided "that the force used . . . [is] reasonable and proportioned to the injury attempted

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toward another person must reasonably believe that his actions are authorized by law and that the use of such force is necessary as required by R.W.C.C. § 9A.16.070.

182. This proposed section is consistent with M.P.C. § 3.03 and, with slight modification, has generally been adopted by other jurisdictions examined. *See, e.g.*, N.Y. PENAL LAW § 35.05(1) (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-17 (Special Pamphlet 1972); MICH. REV. CRIM. CODE § 601 (Final Draft 1967).

183. R.W.C.C. § 9A.16.040.

184. WASH. REV. CODE § 9.11.040(3) (1959):

> The use, attempt, or offer to use force upon or toward the person of another shall not be lawful in the following cases: . . . (3) Whenever used by a party about to be injured, or by another lawfully aiding him, in preventing or attempting to prevent an offense against his person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his possession, in case the force is not more than shall be necessary. . . .

Although the present justification statute does not speak in terms of a reasonable belief as does the Proposed Code, Washington case law requires that the actor's belief as to the necessity for using force be reasonable. *See* State v. Rummelhoff, 1 Wn. App. 192, 459 P.2d 976 (1969); State v. Ladiges, 66 Wn.2d 273, 401 P.2d 977 (1965); State v. Miller, 141 Wash. 104, 250 P. 645 (1926).

185. R.W.C.C. § 9A.16.040(2). It should be noted that the unlawful arrest itself is the only act to which the arrestee is not justified in responding with force. Should the arresting officer go beyond a simple arrest so that the arrestee is threatened with bodily injury, then the use of reasonable force to avoid that injury would be justified. A problem might arise where the only factor that makes the arrest illegal is the fact that unreasonable force is being used. However, a proper analysis would allow the use of force by the person arrested under such circumstances on the theory that he is using force to resist the unreasonable force, not that he is doing so to resist arrest.

The proposed section is consistent with M.P.C. § 3.04(2)(a)(i); however, New York, Connecticut and the proposed code of Michigan all reject such a limitation. *See* N.Y. PENAL LAW § 35.15 (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-18 (Special Pamphlet 1972); MICH. REV. CRIM. CODE § 615 (Final Draft 1967).

186. 40 Wn.2d 92, 241 P.2d 447 (1952).

upon the party sought to be arrested . . . ."[187] This change appears to be based on the theory that a temporary loss of freedom resulting from an illegal arrest is not sufficiently serious to warrant the use of force in its avoidance. However, the possibility of police abuse of such a rule does exist, and it is not clear that a person should be required to submit to a patently illegal arrest which possibly is designed to prevent the exercise of protected rights.

Second, the proposed section significantly restricts the circumstances under which a person is justified in using deadly force in self-defense. Consistent with present law, a person attacked may use deadly force if he reasonably believes the use of such force to be necessary to protect himself against death, serious bodily harm, kidnapping or forcible rape, so long as he has not initiated the conflict by using or threatening deadly force.[188] However, the justification defense is not available under the Code if the person attacked knows that he can avoid the necessity of using deadly force with complete safety.[189] This limitation causes a substantial modification of the "duty to retreat" rule in Washington. Under present Washington law, "one who is where he has a lawful right to be is under no obligation to retreat when attacked."[190] While the Proposed Code does not expressly impose a duty to retreat in the face of deadly force, the duty of avoidance it adopts is an even more stringent limitation on the use of deadly force. It clearly includes a duty to retreat or to take whatever other action is available before resorting to deadly force whenever the actor knows that such retreat can be accomplished with complete safety.[191]

187. *Id.* at 95, 241 P.2d at 449.

188. Under present Washington law homicide is justifiable "when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished. . . ." WASH. REV. CODE § 9.48.170 (1959). Although on its face this statute authorizes the use of deadly force to prevent the commission of any felony, it has been construed as authorizing the use of such force only when the felony threatens loss of life or great bodily harm. *See,* State v. Nyland, 47 Wn.2d 240, 287 P.2d 345 (1955). Therefore, that aspect of the proposed section is quite consistent with present Washington law.

189. R.W.C.C. § 9A.16.040(3)(c). Only two exceptions to this requirement exist: (1) where the actor is in his dwelling or place of work, and (2) where the actor is a public officer otherwise authorized to use force in the execution of his duties, or a person authorized to render him assistance, or a person justified in using force to effect an arrest or to prevent an escape.

190. State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71, 75-76 (1936). *See also* State v. Hilsinger, 167 Wash. 427, 9 P.2d 357 (1932); State v. Meyer, 96 Wash. 257, 164 P. 926 (1917).

191. The Model Penal Code and the statutes of many jurisdictions have provi-

With respect to the use of non-deadly force, the Proposed Code continues the established rule that there is no duty to retreat.[192]

D. *Use of Force for the Protection of Other Persons*

The Proposed Code justifies the use of force in the protection of a third person when, under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would be justified in using such force, provided that the actor reasonably believes his intervention to be necessary for the protection of that other person.[193] The use of deadly force under this section is limited as under R.W.C.C. § 9A.16.040 in that it is not justifiable if the actor knows that he can avoid the necessity of using such deadly force with complete safety to himself and to the person whom he seeks to protect. Again, the obligation to avoid the necessity of using deadly force apparently includes the duty to retreat or to take whatever alternative action might be available under the circumstances, so long as it can be done with complete safety to both the actor and the third person.

This duty of avoidance clearly includes a duty to attempt to cause the third party to retreat before applying deadly force if it appears that such opportunity is available. However, if the victim refuses to retreat, the actor still is not justified in assisting with deadly force. Under such circumstances the use of deadly force is conditioned on the actor's reasonable belief that the person he is assisting would be justified in using such forces;[194] if the victim knows of an opportunity to retreat but refuses to take it, his use of deadly force would not be justified. Thus the proposed section effectively precludes the defense of justification for the person who, by using deadly force, knowingly aids a third party who stands his ground despite ample opportunity to escape.[195]

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sions similar to that in the Proposed Code. Those codes, however, typically require the actor to (1) retreat, (2) surrender possession of property to a person asserting a claim of right thereto, and (3) abstain from any action which he has no duty to take. *See, e.g.*, M.P.C. § 3.04(2)(b)(iii); N.Y. PENAL LAW § 35.15(2) (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-19(b)(1) (Special Pamphlet 1972); MICH. REV. CRIM. CODE § 615(2) (Final Draft 1967). While the Proposed Code does not specifically list the above requirements as conditioning the justifiable use of deadly force, it does contain language that would include such duties.

192. R.W.C.C. § 9A.16.040(4).

193. R.W.C.C. § 9A.16.050.

194. R.W.C.C. § 9A.16.050(1)(a).

195. By comparison, the Model Penal Code provides that when a person whom the

This section of the Proposed Code differs from present Washington law in two respects. First, the Code allows a reasonable mistake by the actor in determining the right of the third person to use self-defense. It is not clear that present Washington law would allow such a mistake.[196] Second, since the current law does not impose a duty to retreat in the face of deadly force, knowledge of the actor that the third party could retreat with complete safety would not preclude his use of deadly force in the defense of that third person.[197]

E. Use of Force for Protection of Property

The use of force in the protection of property is justifiable under the Code when it is reasonably believed to be necessary "to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property . . . ."[198] This defense is not available unless the actor reasonably believes the property to be in his possession or in the possession of another for whose protection he acts. This section is generally consistent with current Washington law.[199]

One significant limitation on this defense which does not exist under present law is that the use of force either to prevent a trespass or to terminate one in progress is not justified if the actor knows that to do so will expose the trespasser to a substantial danger of serious bodily harm.[200] Although this limitation is clearly consistent with a principle

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actor seeks to protect would be obliged to retreat, the actor is obliged to try to cause him to do so "*before* using deadly force." M.P.C. § 3.05(2)(b) (emphasis added). This implies that the actor is justified in using deadly force if his attempt to cause the third party to retreat is unsuccessful.

196. In State v. Tribett, 74 Wash. 125, 132 P. 875 (1913), the court said that "one who goes to the defense of another stands in the shoes of him he seeks to defend." *Id.* at 131, 132 P. at 878. A literal application of that rule would preclude a reasonable mistake in determining whether the third party would be justified in using such force. However, in *Tribett* the actor in fact did have knowledge that the third person was the initial aggressor, so the question of reasonable mistake was not in issue.

197. *See* note 190 and accompanying text *supra*.

198. R.W.C.C. § 9A.16.060(1).

199. However, while the Proposed Code allows a reasonable mistake by the actor as to the lawfulness of his possession of the property, the present statute requires actual lawful possession. *See* note 184 *supra*.

200. R.W.C.C. § 9A.16.060(3).

Washington law does provide the limited restriction that the amount of force used to expel a passenger from a carrier shall be "not more than shall be necessary to expel the offender with reasonable regard to his personal safety . . . ." WASH. REV. CODE § 9.11.040(5) (1959).

that places a greater value on human life than on property, other jurisdictions have not adopted it.[201]

The Code permits the use of deadly force in the protection of property only where the actor reasonably believes that the person against whom the force is directed is attempting to commit a forcible offense in or against the actor's dwelling or place of work, and the use of nondeadly force to prevent commission of the offense would expose the actor or another to a risk of bodily harm.[202] This provision differs somewhat from present Washington law and places three significant limitations on the use of deadly force in the protection of property.

First, the Code restricts the use of deadly force to those instances where the offense is against the actor's "dwelling or place of work," while the present statute applies to an offense against any property in the actor's possession.[203] Second, the Code requires that the offense attempted be a "forcible offense," while the present law requires that it be a felony characterized by "violence and surprise."[204] The term "forcible offense" is not defined by the Code, but "forcible felony" is defined as "any felony which involves the use or threat of physical force or violence against any *person*."[205] If forcible offense is similarly defined the result would be that deadly force may not be used in the protection of property unless the offense involves the use or threat of physical force or violence against a person rather than against property alone.[206] Third, deadly force may not be employed unless the use of

201. *See, e.g.*, N.Y. PENAL LAW § 35.25 (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-21 (Special Pamphlet 1972); MICH. REV. CRIM. CODE § 625 (Final Draft 1967).
This subsection is similar to M.P.C. § 3.06(3)(b) which, according to the comments to an earlier draft (M.P.C. § 3.06(2)(c), Comment at 42 (Tent. Draft No. 8, 1958)), is designed to apply to instances where a trespasser might be forced from a moving vehicle or expelled from a bar drunk and unconscious late at night. However, the statute would be applicable to a wide range of additional circumstances. For example, a person seeking refuge from an oncoming storm of such intensity that it would expose him to substantial danger of serious bodily harm could not be forcibly denied entrance into a dwelling if the actor was aware of the risk of injury.

202. R.W.C.C. § 9A.16.060(4).

203. WASH. REV. CODE § 9.11.040(3) (1959).

204. State v. Nyland, 47 Wn.2d 240, 242, 287 P.2d 345, 347 (1955).

205. R.W.C.C. § 9A.04.130(10) (emphasis added).

206. If "forcible offense" is defined in this manner, the result would not differ substantially from current law. In State v. Nyland, 47 Wn.2d at 242-43, 287 P.2d at 347, the court stated that the use of necessary deadly force is allowed "in defense of [one's] person, his family or property against one who manifestly endeavors by violence to commit a felony, as murder, robbery, rape, arson or burglary. In all these felonies, from their atrocity and violence, human life either is, or is presumed to be in peril."

non-deadly force would expose another person to a risk of bodily harm.[207]

F. Use of Force in Law Enforcement

1. Non-deadly Force

The Proposed Code justifies the use of non-deadly force when the actor reasonably believes it to be necessary to effect a lawful arrest.[208] This provision is consistent with present Washington law with respect to the use of non-deadly force by a police officer.[209] However, the Code expands the circumstances under which a private person is justified in using force to effect an arrest by allowing the use of non-deadly force regardless of the nature of the crime. Present Washington law allows a private person to use force to effect an arrest only where the person arrested has committed a felony.[210]

2. Deadly Force

The Proposed Code allows the use of deadly force to effect an arrest only where the person using such force is a police officer or is rendering assistance to a person whom he reasonably believes to be a police officer.[211] Additionally, such person must reasonably believe that the arrest is for a felony that either involved the use or threatened use of deadly force, or creates a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.[212] This rule is narrower than the current law which allows the

207. R.W.C.C. § 9A.16.060(4)(b). "Bodily harm" is not defined by the Proposed Code, but "bodily injury" is defined as "physical pain, illness or any impairment of physical condition." R.W.C.C. § 9A.04.130(4).

208. R.W.C.C. § 9A.16.070(1). The use of force, however, is conditioned upon the actor's first making known to the person to be arrested his intent to make the arrest, unless he reasonably believes that such person already knows his purpose or that the purpose cannot reasonably be made known to him. R.W.C.C. § 9A.16.070(2)(a).

209. WASH. REV. CODE § 9.11.040(1) (1959). A possible difference is that the current statute requires that the use of force be "necessary," while the proposed provision requires only a reasonable belief as to necessity. However, WASH. REV. CODE § 9.11.040(3) (1959) has been held to require only a reasonable belief as to necessity, *see* note 184 *supra*, and although there are no cases in point, the same construction should apply to WASH. REV. CODE § 9.11.040(1) and (2).

210. WASH. REV. CODE § 9.11.040(2) (1959).

211. R.W.C.C. § 9A.16.070(2)(b)(i).

212. R.W.C.C. § 9A.16.070(2)(b)(ii)-(iii). The Proposed Code is consistent with

use of deadly force whenever necessary to effect the arrest of any felon.[213]

In contrast to the Code's limitation on the justifiable use of deadly force by private persons in effecting an arrest to those individuals assisting a police officer, the Code surprisingly includes within the escape from custody subsection a provision which erodes this limitation. The escape from custody provision justifies the use of deadly force by a private person "if he reasonably believes such deadly force is necessary to effect the arrest of a person who the actor reasonably believes has committed murder, manslaughter in the first degree, arson in the first degree, robbery or forcible rape and who is in immediate flight therefrom."[214] This provision is unusual both with respect to its location within the Code and with respect to its content. If the provision is to be included at all, it would be more appropriate to place it within the subsection dealing with the use of force to effect an arrest rather than the subsection regarding the use of force to prevent escape from custody. By its terms this provision does not apply where a person is attempting an escape from custody, and since it allows the use of deadly force by a private party who is not assisting a police officer it is clearly inconsistent with the limitations the Code otherwise places on the use of force to effect an arrest.[215]

This provision is also unusual in justifying the use of deadly force by a private person to effect an arrest under circumstances where a police officer would not be similarly justified. For example, under this subsection a private person is justified in using deadly force if he reasonably believes it to be necessary to effect the arrest of a person he reasonably believes to have committed a robbery.[216] There is no requirement that

M.P.C. § 3.07(2)(b) in this respect, and that rule has been adopted by New York. *See* N.Y. PENAL LAW § 35.30(2) (McKinney 1967).

213. WASH. REV. CODE § 9.48.160 (1959) authorizes the use of such force by a police officer. In State v. Clark, 61 Wn.2d 138, 377 P.2d 449 (1962), the court concluded that a private person is authorized to use deadly force under the same circumstances as a police officer. *Id.* at 144, 377 P.2d at 453. *See also* note 216 *infra.*

214. R.W.C.C. § 9A.16.070(3)(c).

215. *See* notes 211,212 and accompanying text *supra.*

216. In State v. Clark the court concluded that a private person is authorized "to use deadly force in attempting to apprehend a fleeing felon in any situation where it would be lawful for a peace officer to do so." 61 Wn.2d at 144, 377 P.2d at 453. The court did not base its decision on an interpretation of WASH. REV. CODE § 9.11.040(2) (1959), but rather it relied on the common law in determining what constitutes "lawful means." This rule was then expressly limited to those instances where the homicide itself

the robbery involve the use or threatened use of deadly force, or that there be a substantial risk that the felon will cause death or serious bodily harm if his apprehension is delayed.[217] Thus, while a police officer would not be justified in using deadly force to effect an arrest under such circumstances, a private person would be so justified.[218]

3. *Prevention of Escape*

The Code adopts the general rule that the amount of force used to prevent the escape of an arrested person may not exceed that which might have been employed initially to effect the arrest under which the person is in custody.[219] However, an officer in a prison or an institutional setting is authorized to use such force as he reasonably believes to be necessary to prevent the escape, including deadly force.[220] He is restricted to the use of non-deadly force only when he knows that the prisoner is in custody for an offense that is not classified as a forcible felony.[221] This subsection is narrower than present Washington law, which justifies homicide when the officer knew that the prisoner was in custody for having committed any felony, whether or not it was forcible.[222]

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was unintentional, and the court pointed out that the Washington justification statute, WASH. REV. CODE § 9.48.160 (1959), is limited in application to peace officers or those acting under their command. Therefore, under present law the "excuse statute," WASH. REV. CODE § 9.48.150 (1959), applies to private citizens and excuses an accidental or unintentional homicide under circumstances where the actor was using deadly force of his own accord for the purpose of arresting a person who had committed a felony. The Code's inclusion of R.W.C.C. § 9A.16.070(3)(c) is apparently an attempt to broaden and codify the rule of *Clark*, an attempt that is of at least questionable wisdom.

217. Justification for the use of deadly force by a police officer does require the existence of these factors. *See* note 212 and accompanying text *supra*.

218. A similar situation exists with respect to the rapist who has committed the crime without either the use or threatened use of deadly force. Again, a police officer could not use deadly force under R.W.C.C. § 9A.16.070(2)(b), but a private person could under R.W.C.C. § 9A.16.070(3)(c). This criticism does not apply to those cases involving murder, first degree manslaughter or first degree arson, because each of those crimes requires the use or threatened use of deadly force.

219. R.W.C.C. § 9A.16.070(3)(a).

220. R.W.C.C. § 9A.16.070(3)(b).

221. *Id.*

222. WASH. REV. CODE § 9.48.160(3) (1959). The approach of the Proposed Code on this point is somewhat more restrictive than the statutes of other jurisdictions examined. *See* N.Y. PENAL LAW § 35.30(7) (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-22(c) (Special Pamphlet 1972); MICH. REV. CRIM. CODE § 630(8) (Final Draft 1967); and M.P.C. § 3.07(3).

4. Assisting an Arrest

The Code justifies a private person assisting an unlawful arrest which he reasonably believes to be lawful in using any force which he would be justified in using if the arrest were lawful.[223] However, if he is assisting a police officer, the use of such force is justifiable unless he knows that the arrest is unlawful.[224] Two separate statutes presently authorize a private person to use force in assisting a police officer.[225] Under R.C.W. § 9.11.040(1) a person may use force in rendering such assistance only when acting under the direction of the police officer. In addition, R.C.W. § 9.01.055 authorizes the voluntary use of such force when the police officer is in imminent danger of loss of life or grave bodily injury and the action is taken under emergency conditions. The latter statute requires only that the action be taken in "good faith," a standard less stringent than the Code's requirement of reasonableness; but under R.C.W. § 9.11.040(1) it is not clear that even a reasonable mistake would be allowed.[226] Neither of the present statutes goes as far as the Code in justifying the use of force by a person voluntarily assisting a police officer in an unlawful arrest under circumstances in which the officer is not in danger of serious bodily injury.

G. Use of Force by Persons with Special Responsibility for Care, Discipline or Safety of Others

The Proposed Code justifies the reasonable use of force by persons with special responsibility for care, discipline or safety of others, mak-

223. R.W.C.C. § 9A.16.070(4).

224. This provision in the Proposed Code differs from M.P.C. § 3.07(4), which distinguishes between assistance rendered an officer in making an arrest at the officer's request and assistance rendered voluntarily. Where the assistance is requested, the actor may use such force as would be justifiable if the arrest were lawful, so long as he does not know it is unlawful. However, where he volunteers assistance either to a police officer or to a private person, (1) he must believe that the arrest is lawful, and (2) the arrest must be lawful if the facts were as he believes them to be. One possible effect of this difference in treatment is that under the Proposed Code the private person might be encouraged to volunteer assistance to a police officer making an arrest, without first stopping to consider the legality of the arrest.

MICH. REV. CRIM. CODE § 630(5) (Final Draft 1967), N.Y. PENAL LAW § 35.30(4) (McKinney 1967), and CONN. GEN. STAT. ANN. § 53a-22 (Special Pamphlet 1972) all follow the Model Penal Code provisions in allowing the more lenient justification standard only where the private person has in fact been directed to assist in the arrest by the police officer.

225. WASH. REV. CODE §§ 9.11.040(1) (1959), 9.01.055 (Supp. 1969).

226. *See* note 209 *supra*.

ing the amount of force allowed and the reasons permitted for its application dependent upon the nature of the actor's responsibility.[227]

Where the actor is a parent or guardian or person similarly situated, or a person acting at the request of such parent or guardian, he is allowed to use reasonable force for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his conduct.[228] Where the actor is a teacher or person similarly situated the force allowed is that which he reasonably believes necessary for performance of his function, including the maintenance of reasonable discipline in school, so long as the use of such force is consistent with the welfare of the child.[229] Where the actor is the guardian of an incompetent, force reasonably necessary for the incompetent's welfare is allowed, or, if the incompetent is in an institution, sufficient force to maintain reasonable discipline is justified.[230]

In no case may the amount of force used by the actor be intended or designed to cause or known to create any risk of causing death, serious bodily harm or disfigurement. There also are limits placed on the amount of pain or degradation that may be intended or risked, but again, the limitation varies with the position of the actor. If the actor is a parent or guardian, the force used may not be intended or designed to cause or known to create any risk of extreme pain or substantial degradation;[231] for guardians of an incompetent and teachers, the limit is substantial pain or undue degradation.[232]

Existing law covers this subject in very general terms by limiting the amount of force allowed under such circumstances to that which is "reasonable and moderate," and providing that its purpose may be only to "restrain or correct."[233] The Proposed Code retains the requirement of reasonableness but substitutes degrees of pain and degradation for the present requirement of moderation. Given the rather indefinite nature of terms such as "extreme," "substantial," "undue," and "mod-

227. R.W.C.C. § 9A.16.080.
228. R.W.C.C. § 9A.16.080(1)(a).
229. R.W.C.C. § 9A.16.080(2)(a).
230. R.W.C.C. § 9A.16.080(3)(a).
231. R.W.C.C. § 9A.16.080(1)(b).
232. R.W.C.C. § 9A.16.080(2)(b), (3)(b).
233. WASH. REV. CODE § 9.11.040(4) (1959):
The use, attempt, or offer to use force upon or toward the person of another shall not be unlawful in the following cases . . .
(4) Whenever used in a reasonable and moderate manner by a parent or his authorized agent, a guardian, master, or teacher in the exercise of lawful authority, to restrain or correct his child, ward, apprentice or scholar . . . .

erate," it is not entirely clear what effect the proposed changes would have. However, some conclusions might be reached concerning the direction of those changes.

The drafters limited the force that may be used by parents to that which does not cause "extreme pain" or "substantial degradation," while the teacher is limited to force which does not cause "substantial pain," or "undue degradation." Presumably the difference in these terms is designed to circumscribe more closely the amount of force that may be used by a teacher. Since the amount of force that may be used by a parent is greater than that which may be used by a teacher, it follows that a parent is allowed to use such force as may cause "substantial pain" or "undue degradation." This seems to allow the use of substantially more force than that which is described as "moderate" under the present statute. Furthermore, the Proposed Code allows the use of force by the parent for the purpose of "punishment," while present law allows its use only for the purpose of restraining or correcting the child.

This section contains what might appear to be a contradiction in terms. Allowing the actor to use such force as he reasonably believes to be necessary so long as it does not cause the specified degrees of pain and degradation suggests that the infliction of some degree of pain or degradation on a child might be "reasonable." It is difficult to imagine circumstances under which it would be "reasonable" to inflict "substantial pain" and "undue degradation" on a child.

It also should be noted that if the disciplinarian is a teacher there is imposed the additional requirement that the force be "used in the exercise of lawful authority."[234] This provision apparently is designed to allow local school boards to take affirmative action in limiting the amount of force otherwise authorized.

H. Duress

The affirmative defense of duress is available under the Proposed Code if the actor engaged in proscribed conduct because he was coerced to do so by "the use or threatened imminent use of unlawful physical force upon him or a third person, which . . . a person of rea-

234. R.W.C.C. § 9A.16.080(2)(c).

sonable firmness in his situation would have been unable to resist."[235] This defense is not available to a person who intentionally or recklessly places himself in a situation where it is probable that he will be subjected to duress, or to the woman who acts merely on the command of her husband unless she acted under such coercion as would otherwise establish the defense.[236]

Under existing Washington law the defense of duress is limited to those instances where, by threats, there is created a "reasonable apprehension" in the mind of the actor that in case of refusal he is likely to suffer "instant death or grievous bodily harm."[237] Although there is no case in point, this suggests that the threat of harm to a third person is not sufficient to constitute the defense of duress in Washington. Thus the Proposed Code substantially expands the defense by including situations where the threat is toward a third person and where the threat is merely of physical injury. Another significant change under the Proposed Code is that duress is available as a defense to a murder prosecution, whereas murder is specifically excluded from the current statute.[238]

By generally expanding the defense of duress, the drafters of the Proposed Code have adopted the logical position that a person should not be held criminally liable for committing an act that any person of reasonable firmness would have committed under similar circumstances.[239]

I. Entrapment

The Proposed Code establishes the affirmative defense of entrapment where, for the purpose of obtaining evidence of the commission of an offense, a public law enforcement official or one acting in cooperation with him "induces or encourages another person to engage in conduct constituting such offense, when such other person did not then otherwise intend to commit an offense of that nature."[240]

235. R.W.C.C. § 9A.16.090(1).
236. R.W.C.C. § 9A.16.090(2), (3).
237. WASH. REV. CODE § 9.01.112 (1959).
238. *Id.* This exception has been held to apply even when the defendant was coerced into participating in a robbery in the course of which a person was killed. Application of the felony-murder rule was held to preclude the defense of duress. State v. Moretti, 66 Wash. 537, 120 P. 102 (1912).
239. This section is substantially similar to M.P.C. § 2.09, N.Y. PENAL LAW § 35.35 (McKinney 1967), and CONN. GEN. STAT. ANN. § 53a-14 (Special Pamphlet 1972).
240. R.W.C.C. § 9A.16.100.

There is no Washington statute establishing the defense of entrapment; however, it has been recognized repeatedly by the Washington courts.[241] The entrapment provisions of the Proposed Code appear to be generally consistent with Washington case law.[242] However, it is possible that the proposed formulation is somewhat broader than present law in providing that the defense applies "when such other person did not *then* otherwise intend to commit an offense of that nature" (emphasis added). If this language were construed literally it would result in the entrapment defense being available to the defendant who was willing to engage in such conduct, but who did not intend to do so at that time and would not have done so in the absence of the official involvement. Under present law it is immaterial that a person did not *then* otherwise intend to commit the crime so long as his general intent was to commit the crime whenever the opportunity might arise.[243]

V. ANTICIPATORY OFFENSES

A. Attempt

The Proposed Code defines the crime of attempt as: (1) an intent to commit a specific crime coupled with (2) an act which is a substantial step toward the commission of the crime and strongly corroborative of the actor's intent.[244]

241. Although the defense of entrapment has been noted frequently by the Washington courts, a search of the reported cases failed to discover a case in which it was successfully alleged. *But see* State v. White, 5 Wn. App. 283, 487 P.2d 243 (1971), where counsel failed to request an instruction on entrapment and the court said, "[i]f officers request or suggest payment of a bribe from an accused to influence their action, and the accused, having no criminal intention to participate in the bribe prior to the request, acquiesces to the request, he may raise the defense of entrapment to a subsequent charge of bribery." *Id.* at 285, 487 P.2d at 244.

242. The Washington rule of the entrapment defense as stated in State v. Moore, 69 Wn.2d 206, 417 P.2d 859 (1966), is that "[t]he defense of entrapment is available where the accused is lured or induced by an officer of the law or some other person, a decoy or informer, to commit a crime which he had no intention of committing." However, the court added that "[s]uch defense is not available where the criminal intent originates in the mind of the accused and the police officers, through decoys or informers, merely afford the accused an opportunity to commit the offense." *Id.* at 208, 417 P.2d at 861. *See also* Seattle v. Muldrew, 71 Wn.2d 903, 431 P.2d 589 (1967).

243. This proposed subsection is narrower than M.P.C. § 2.13(1)(b) which allows the defense if the official conduct merely creates a "substantial risk that such an offense will be committed by persons other than those who are ready to commit it."

244. R.W.C.C. § 9A.28.010(1). Subsection (2) renounces the defense of impossibility.

This proposed provision makes two changes in the existing law.[245] First, the Washington Supreme Court recently held that the actus reus of the crime of attempt is satisfied by slight acts done in furtherance of a clear and obvious design or intent.[246] In defining the actus reus in terms of a substantial and strongly corroborative act, the Proposed Code requires more movement toward the crime than does existing law and thus allows apprehension of the criminal at a later point in time.[247]

Second, the Proposed Code eliminates impossibility as a defense to the crime of attempt.[248] The intent of the actor and the circumstances as *he* believes them to be are the controlling elements of the crime. This provision places primary emphasis on the dangerous intent of the actor and not on the dangerousness of his act.[249] While the elimination of the impossibility defense broadens the ambit of the crime, the

245. Under current law, "An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime. . . ." WASH. REV. CODE § 9.01.070 (1959). Although the statute would seem to require that the attempt fail, subsection (2) of the same statute states "[a] person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated . . . ." *Id.* at § 9.01.070 (2). The Washington Supreme Court has held the latter to be controlling. State v. Rowe, 60 Wn.2d 797, 376 P.2d 446 (1962).

246. State v. Goddard, 74 Wn.2d 848, 447 P.2d 180 (1968); State v. Nicholson, 77 Wn.2d 415, 463 P.2d 633 (1969).

247. While the practical necessities of proving intent will usually require that the actus reus be at least a substantial step, the existing test does place its emphasis squarely upon the intent of the actor and in the egregious case will permit conviction without a showing of a substantial step. However, the substantial step test is consistent with the other modern codes. *See, e.g.,* M.P.C. § 5.01, Comment (Tent. Draft No. 10, 1960).

Nevertheless, the hazards of definitionally requiring too great an actus reus can be appreciated by considering the decision of the court in People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927). In *Rizzo,* the court found the actus reus to be mere preparation even though the actors were in search for their intended victim. The court concluded that an attempt had not been committed.

248. R.W.C.C. § 9A.28.010(2). Under the existing law, the defense of factual or legal impossibility may work as a bar to conviction for the crime of attempt. *Cf.* State v. Ray, 63 Wn.2d 224, 386 P.2d 423 (1963) (dicta); State v. Meyer, 37 Wn.2d 759, 226 P.2d 204 (1951) (physical impossibility). *But see* State v. Nicholson, 77 Wn.2d 415, 463 P.2d 633 (1969). Conversely, under the Proposed Code, the actor would be guilty of an attempt, regardless of the impossibility of the crime. Implementing its policy of incarcerating dangerous people, the Code allows an actor to be convicted of an attempt if under the circumstances as the actor believed them to be, the actor manifested the requisite actus reus and mens rea. For example, both the pickpocket who picks an empty pocket and the fence who receives property which he believes to be stolen, but in fact is not stolen, would be guilty of an attempt under the Proposed Code. Most of the other modern codes have abolished the defense of impossibility. *See, e.g.,* M.P.C. § 5.01(1)(a), Comment (Tent. Draft No. 10, 1960); N.Y. PENAL LAW § 110.10 (McKinney 1967); ILL. ANN. STAT. ch. 38, § 8-4 (Smith-Hurd 1964).

249. An often used example of this doctrine is the witch doctor who sticks pins in a doll, attempting to murder a person. While the substantive crime is impossible of completion, the witch doctor manifests a dangerous personality, and should be incarcerated lest he turn to more practical means of accomplishing his purpose.

overall effect of the proposed provision is a more restrictive definition of attempt than presently exists. Since the impossibility defense is seldom raised and affects only the type of actor who can be convicted, the substantial step test's effect of preventing arrest until a later point in time is likely to be the much more significant of the two changes.

The statute also requires that the actor intend to commit a *specific* crime. The majority of modern codes do not include this requirement,[250] instead requiring only that the actor intend to perform conduct constituting a crime. If the actor is required to intend a specific crime, he must act intentionally with respect to each element of the crime, regardless of the mental state requirements in the definition of the attempted crime. However, if the actor need only intend that conduct constituting a crime be performed, he must specifically intend the conduct, but not all the elements of the resulting crime. The effect of this difference is that in the latter case it is possible to obtain a conviction for an attempt of a crime in which the mens rea element is satisfied by a negligent mind in regard to the attendant circumstances. Under the Proposed Code's "specific crime" requirement, however, each element, including the attendant circumstances, is required to be intended.

The specific crime requirement has been criticized as an overly simplistic approach to the mens rea requirement.[251] The reporter of the proposed California criminal code sums up the widespread criticism of the specific crime requirement:[252]

> The intent requirement should be satisfied where the defendant intends to engage in the conduct which will constitute the crime. He need not necessarily contemplate all of the surrounding circumstances

250. CONN. GEN. STAT. ANN. § 53a-49 (Supp. 1971); N.Y. PENAL LAW § 110 (McKinney 1967); M.P.C. § 5.01 (Tent. Draft No. 10, 1960). *Contra,* ILL. ANN. STAT. ch. 38 § 8-4 (Smith-Hurd 1964); MICH. REV. CRIM. CODE § 1001 (Final Draft 1967). However, the Illinois Supreme Court has held that the consequences of reckless conduct can be deemed to have been caused intentionally. People v. Horne, 110 Ill. App. 2d 167, 249 N.E.2d 282 (1969); People v. Coolidge, 26 Ill. 2d 533, 187 N.E.2d 694 (1963). The Washington court has rejected this argument. State v. Leach, 36 Wn.2d 641, 219 P.2d 972 (1950). Thus it appears that the rationale used by the Illinois Supreme Court to avoid the specific crime requirement has been rejected by the Washington Supreme Court.

Present Washington law includes the specific crime requirement. "An act done with intent to commit a crime and tending but failing to accomplish it, is an attempt to commit that crime." WASH. REV. CODE § 9.01.070 (1959).

251. PROP. ORE. CRIM. CODE § 54, Comment (Final Draft 1970).

252. *Id. Accord,* M.P.C. § 5.01(1), Comment (Tent. Draft No. 10, 1960); *contra,* PERKINS, at 573.

included in the definition of the crime. Assume that raping a fifteen year old is a more aggravated crime than raping a seventeen year old. Assume also that negligence as to the age of the victim suffices for that element of the crime. Is this not an aggravated attempt where a fifteen year old is attacked, even if it can only be shown that the defendant was only negligent as to the age of the victim?

By including the specific crime requirement, the proposed attempt provision compels inordinate concern with the intended substantive crime, which results in a more stringent mens rea requirement for attempt than the mens rea requirement of the crime attempted.

A comparison of the foreseeable results under the specific crime and defense of impossibility provisions illustrates the "rob Peter to pay Paul" draftsmanship in this section. The renunciation of the impossibility defense seeks to permit successful prosecution of an attempt to commit a crime which is either impossible to attain or void of criminal sanction. Conversely, the specific crime requirement may prevent successful prosecution of an attempt to commit a crime, even though the actor manifests the necessary intent to be convicted of the substantive crime if the attempt is successful.[253]

B. Solicitation

Under the Proposed Code, the crime of solicitation has three essential elements: (1) an intent to accomplish a specific crime, (2) an offer to give money or something of value to another person, and (3) a request that the other person engage in specific conduct which would either itself constitute the specific crime or would establish complicity of such other person in the crime or its attempt.[254] Since there is pres-

253. This result may be questioned in light of the drafters' goals, for both types of individuals seem equally dangerous. If anything, the actor who attempts a crime impossible of successful completion may be less of an immediate danger than the actor who has the requisite mens rea for the crime itself though he lacks the specific intent necessary for an attempt conviction. Although the person exculpated of attempt might be prosecuted for completion of a lesser crime, prosecution for a lesser included offense seems an unsatisfactory price to pay for the inclusion of the specific crime language.

The specific crime requirement should be redrafted so as to require "a specific intent to perform acts and attain a result." *See* WIS. STAT. ANN. § 939.32 (1955). This language would require the actor to specifically intend that conduct constituting a crime be performed and yet would allow a lower degree of mens rea to suffice for the attendant circumstances. In this way the statute would be definitionally more consistent.

254. R.W.C.C. § 9A.28.020(1) provides:

A person is guilty of criminal solicitation when, with intent to promote or facilitate

ently no statutory crime of solicitation in Washington,[255] the common law definition is controlling.[256]

The Proposed Code more narrowly defines solicitation than does the common law in three respects. First, the Proposed Code requires that the solicitor intend that a specific crime be committed, whereas the common law requires that the actor know that the conduct solicted constitutes a crime.[257] This requirement, as discussed in the attempt section,[258] is an overly simplistic approach to the mens rea requirement.[259] Arguably, this requirement is more properly included in the solicitation provision because the early nature of this offense may require a higher mens rea requirement in order to insure that an equivocal offer is not prosecuted. Nevertheless, the Code's requirement that the actor induce another to engage in specific criminal conduct seems to insure that an equivocal offer will not be prosecuted,[260] without requiring intent concerning the attendant circumstances. Thus it is doubtful that the requirement of an intent to commit a specific crime is necessary.[261]

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the commission of a specific offense, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such offense or which would establish complicity of such other person in its commission or attempted commission.

255. The only statute that presently relates to solicitation is WASH. REV. CODE § 9.01.030 (1959). That statute is concerned with vicarious criminal liability and does not deal with solicitation as a separate crime. Under the Proposed Code, a solicitor would still incur vicarious liability. R.W.C.C. § 9A.08.060.

256. The common law crime of solicitation generally requires that the solicitor urge, request or advise another person to commit a crime which is a felony, or a crime against the public, or an aggravated misdemeanor. 1 ANDERSON, WHARTON'S CRIMINAL LAW & PROCEDURE § 81 (1957); *accord,* State v. Davis, 6 S.W.2d 609 (Mo. 1928); *cf.* PERKINS at 582. *But cf.* State v. Schleifer, 99 Conn. 432, 121 A. 805 (1923).

However, in the few Washington cases that have dealt with solicitation, the defendant was charged with the crime of attempt and not with the common law crime of solicitation. State v. Butler, 8 Wash. 194, 35 P. 1093 (1894); State v. Awde, 154 Wash. 463, 282 P. 908 (1929).

257. For the definition of common law solicitation, *see* note 256 *supra.*

258. *See* note 251 and accompanying text *supra.*

259. The requirement of a "specific intent" is not found in other modern codes which define solicitation. *See* M.P.C. § 5.02; N.Y. PENAL LAW § 100 (McKinney 1967); ILL. STAT. ANN. ch. 38, § 8-1 (Smith-Hurd 1964); WIS. STAT. ANN. § 939.30 (1958); MICH. REV. CRIM. CODE § 1010 (Final Draft 1967).

260. The comments to the Code state: "The utilization of the phrase specific conduct . . . is an effort to limit the applicability of this section in a way which will protect legitimate agitation or advocacy. Under this formulation . . . it is necessary that the solicitation carry meaning in terms of some concrete course of conduct that it is the actor's object to incite, by means of some economic inducement." R.W.C.C. § 9A.28.020. Comment at 107-08. For a discussion of the specific conduct requirement, *see* note 261 and accompanying text *infra.*

261. The jurisdictions that have recently adopted criminal codes have not found it necessary to include the "specific crime" element. *See* note 259 *supra.*

Second, the Proposed Code requires solicitation of specific conduct,[262] whereas the common law definition contains no such requirement. Solicitation has been called an "attempt to conspire"; it therefore supplants conspiracy as the earliest indictable statutory anticipatory offense.[263] The requirement of specific conduct is an attempt to uphold the first amendment right to free speech (and thereby insure the constitutionality of the provision) by differentiating between the expression of abstract theories and those statements which seek to arouse specific criminal conduct.[264]

Finally, the Proposed Code narrowly defines the actus reus as an "offer of money or other thing of value," whereas under the common law the actus reus can be urging, requesting or advising. This provision is without precedent in the modern criminal codes.[265] If the proposed statute is designed to emphasize the dangerous intent of the actor, it seems immaterial whether the actor urges, commands or offers money, so long as the act is sufficient to establish the actor's dangerous intent.[266] In addition, obvious definitional problems are presented by this requirement. The use of the word "offer" seems to smack of contract law as does the language "money or other things of value." Questions concerning when an effective offer is made, what constitutes legal

262. Most of the other modern criminal codes require the "specific conduct" element in the crime of solicitation. M.P.C. § 5.02; N.Y. PENAL LAW § 100 (McKinney 1967); MICH. REV. CRIM. CODE § 1010 (Final Draft 1967). While Illinois and Wisconsin do not require that specific conduct be solicited, the Constitution of the United States does require solicitation of specific conduct which is a clear and present danger if first amendment rights are affected. Yates v. United States, 354 U.S. 298 (1957).

263. M.P.C. § 5.02, Comment (Tent. Draft No. 10, 1960). The crime requires less actus reus toward the substantive crime than any other inchoate crime. Connecticut did not adopt a solicitation statute, and the New York reporter expressed misgivings over the adoption of such a statute in New York. *See* N.Y. PENAL LAW § 100, Practice Commentary (McKinney 1967).

264. The specific conduct requirement is a response to Yates v. United States, 354 U.S. 298 (1957). In that case the defendants were charged with, in effect, conspiracy to solicit and aid and abet the overthrow of the United States. The court held that mere advocacy of future action was not sufficient to constitute solicitation, applying Dennis v. United States, 341 U.S. 494, 510 (1951) (the court applied the "clear and present danger" test).

265. *See* M.P.C. § 5.02; ILL. STAT. ANN. ch. 38, § 8-1 (Smith-Hurd 1961); N.Y. PENAL LAW § 100 (McKinney 1967); ORE. REV. STAT. § 161.435 (1971); MICH. REV. CRIM. CODE § 1010 (Final Draft 1967); WIS. STAT. ANN. § 939.30 (1955). The Oregon statute is the most restrictive in language, limiting the actus reus to "commanding or soliciting" whereas the New York statute seems to be the broadest, using the language "solicits, requests, commands, importunes, or otherwise attempts."

266. The practical effect of the offer requirement is that an actor who unequivocally urges or requests another to commit a crime, thereby clearly manifesting his own dangerousness, cannot be apprehended until he offers money or some other thing of value.

value, and differences between equitable and legal principles in contract law, are best left to the civil law.

This narrow definition of criminal solicitation is useful only to the extent that it prevents the prosecution of an equivocal offer. However, the statute could more directly prevent such a prosecution by explicitly requiring an unequivocal actus reus. This would allow the provision to encompass a broader actus reus without lessening the protection afforded against an improper prosecution.

C. *Conspiracy*

The Proposed Code defines conspiracy by requiring that: (1) the actor intend that conduct constituting a crime be performed, (2) the actor agree with one or more persons to engage in or cause the performance of such conduct, and (3) an overt act be performed which is an unequivocal step toward commission of the crime and corroborative of the actor's intent.[267]

The changes sought by the Proposed Code are threefold. First, the Code requires intent, whereas the present definition's mens rea element permits conviction of one who merely "aids with knowledge."[268] Since the supplier or salesman who aids with knowledge is not necessarily dangerous, the proposed statute properly focuses on the intent of the dangerous actor. Second, the Proposed Code is unilateral in its approach, whereas the present law is bilateral.[269] By requiring

267. R.W.C.C. § 9A.28.030(1) provides:

> A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct and any one of them commits an overt act in pursuance of such agreement:
>
> (a) which act is an unequivocal step toward the performance of that crime; and
>
> (b) which act corroborates the actor's intent that such crime be committed.

Subsection (2) will not be cited or referred to because it merely explains what is implicit in the subsection cited.

268. *Compare* Eyak River Parking Co. v. Huglen, 143 Wash. 229, 255 P. 123 (1927), (an attorney who aided with knowledge was found guilty of conspiracy) *with* R.W.C.C. 9A.28.030(1).

See also People v. Lauria, 251 Cal. App.2d 471, 59 Cal. Rptr. 628 (1967); *cf.* United States v. Falcone, 311 U.S. 205 (1940). However, aiding with knowledge can imply a higher mental state if, for example, the product or service sold is of such a nature or quantity as to imply that the seller had a stake in the illegal conduct. United States v. Tramaglino, 197 F.2d 928 (2nd Cir. 1952); Direct Sales Co. v. United States, 319 U.S. 703 (1943).

269. The present law requires proof that two or more persons agreed, whereas the Proposed Code's unilateral approach only requires evidence that *a person* agreed with one or more persons, thus obviating the existing law's implicit requirement of convic-

merely that the actor agree with one or more persons, the statute isolates the individual actor's involvement and dangerous intent, instead of emphasizing group involvement and the dangerous nature of group activitites.[270] The unilateral approach makes it immaterial in determining the guilt of an actor that his co-conspirators either have been acquitted or for some reason will not be tried.[271]

Third, the Code requires that an *unequivocal* overt act which corroborates the actor's intent[272] be proven, while present law has no overt act requirement.[273] The Code's requirement is unique among the modern conspiracy statutes, most of which require only an overt act.[274] Generally, an overt act is required to afford the actor a *locus poenitentiae*[275] or to give the court minimal assurances of criminal pur-

tion of the co-conspirators. *Compare* WASH. REV. CODE § 9.22.010 (1959) *with* R.W.C.C. § 9A.28.030.

270. *Compare* Braverman v. United States, 317 U.S. 49 (1942); Krulewitch v. United States, 336 U.S. 440 (1949).

271. The reason for this change is well stated by the reporter of the Illinois Revised Criminal Code: "However, this rationale [the old rationale of acquittal for one conspirator if his co-conspirator(s) was acquitted] was rejected as being too technical and overlooking the realities of trial which involve differences in juries, contingent availabilities of witnesses, the varying abilities of different prosecutors and defense attorneys, etc." ILL. STAT. ANN. ch. 38, § 8-2, Comment (Smith-Hurd 1964); *accord,* PROP. ORE. CRIM. CODE § 59, Comment at 58 (1970); N.Y. PENAL LAW § 105 (McKinney 1967). The bilateral approach makes conviction impossible in those cases in which the actor agrees with another whose purpose is noncriminal. For example, in People v. Bauer, 32 App. Div. 2d 463, 305 N.Y.S.2d 42 (1969), it was held that an actor cannot agree with another whose intent is to aid in the apprehension of the actor. Under the unilateral approach, such a conspirator would be guilty. *See generally* Annot., 91 A.L.R.2d 700 (1963).

272. *Compare* WASH. REV. CODE § 9.22.020 (1959) *with* R.W.C.C. § 9A.28.030(1). For cases illustrating the general confusion concerning the requirement of an overt act, see State v. Galdstone, 78 Wn.2d 306, 474 P.2d 274 (1970); United States v. Olmstead, 5 F.2d 712 (W.D. Wash. 1925); Bannon v. United States, 156 U.S. 464 (1895).

273. The existing criminal code does not satisfactorily define the crime of conspiracy. *See* WASH. REV. CODE § 9.22.010 (1959). The present definition is derived from judicial opinion, which requires that a conspiracy consist of: (1) two or more persons, (2) a combination or agreement, and (3) a desire to accomplish a criminal or unlawful end or a lawful end by unlawful means. State v. Messner, 43 Wash. 206, 86 P. 636 (1906); Harrington v. Richeson, 40 Wn.2d 557, 245 P.2d 191 (1952); State v. Stewart, 32 Wash. 103, 72 P. 1026 (1903). The present code expressly provides that an overt act need not be proven. WASH. REV. CODE § 9.22.020 (1959).

The most recent legislative statement defining conspiracy deals with conspiracy against government entities. WASH. REV. CODE § 9.22.040 (Supp. 1970). While a discussion of this statute is beyond the scope of this note, the provision was borrowed from 18 U.S.C. 371 (1948). For the colorful history of the federal counterpart, *see* Goldstein, *Conspiracy to Defraud the United States* 68 YALE L.J. 405 (1958).

274. *See* ILL. STAT. ANN. ch. 38, § 8-4 (Smith-Hurd 1961); N.Y. PENAL LAW § 105.20 (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-48 (Supp. 1971); WIS. STAT. ANN. § 939.32 (1956); M.P.C. § 5.03 (Tent. Draft No. 10, 1960). Neither ORE. REV. STAT. § 161.450 (1971) nor MICH. REV. CRIM. CODE § 1015 (Final Draft 1967) requires an overt act.

275. PERKINS at 618. *Accord,* ORE. REV. STAT. § 161.450 (1971); Hyde v. Shine, 199 U.S. 62, 76 (1905); United States v. Britton, 108 U.S. 199, 204-05 (1883).

pose.[276] The comments to the Proposed Code suggest that the purpose of this requirement is to insure that an equivocal agreement is not prosecuted.[277] This goal could be accomplished more directly by requiring an unequivocal agreement. The provision could then contain a less restrictive overt act requirement, and the fears of the drafters would still be assuaged. However, since the courts generally construe any act as satisfying the overt act requirement[278] and since the Proposed Code provides elsewhere for a statutory *locus poenitentiae*,[279] even a less restrictive overt act requirement may be unnecessary.[280]

Finally, the word "unequivocal" in the Code's definition of conspiracy is ambiguous. If the unequivocal and corroborative step requirement is applied literally, conspiracy could replace attempt as the latest completed anticipatory offense. This result is possible because conspiracy is not completed until an act is performed which is an "unequivocal step," which arguably is closer to actual completion of the crime than the "substantial step" toward completion required by the attempt provision.[281] This interpretation would have the effect of making an attempt indictable earlier in time without a corresponding redefinition of the penalty provisions of each crime.[282] Since it is likely

276. Yates v. United States, 354 U.S. 298, 334 (1957); M.P.C. § 5.03(5), Comment (Tent. Draft No. 10, 1960) (misdemeanors only).

277. R.W.C.C. § 9A.28.030, Comment at 111.

278. Under the usual overt act requirement, the courts generally seize upon any overt act, no matter how equivocal, if the other elements of the crime are proven. Smith v. United States, 92 F.2d 460 (9th Cir. 1937); Yates v. United States, 354 U.S. 298, 333, 334 (1957); Kaplan v. United States, 7 F.2d 594 (2nd Cir. 1925), *cert. denied*, 269 U.S. 582 (1925); *see* Pollack, *Common Law Conspiracy*, 35 GEO. L.J. 328, 338 (1947): "The courts somehow discover an overt act in the slightest action on the part of the conspirators."

279. The modern codes, including the Proposed Code, allow for renunciation by the actor. The effect of this is to provide a statutory *locus poenitentiae* which did not exist before the modern codes. *Compare* R.W.C.C. § 9A.28.040 *with* State v. McGilvery, 20 Wash. 240, 55 P. 115 (1898).

280. Neither the new Oregon criminal code nor the proposed Michigan code even requires an overt act. *See* ORE. REV. STAT. § 161.450 (1971); MICH. REV. CRIM. CODE § 1015 (Final Draft 1967); *accord*, WASH. REV. CODE § 9.22.020 (1959).

At common law, proof of the agreement was held to prove the overt act. *See* M.P.C. § 5.03(5), Comment (Tent. Draft No. 10, 1960); Note, 37 HARV. L. REV. 1121, 1122 (1924); PERKINS at 617; State v. McGonigle, 144 Wash. 252, 258 P. 16 (1927).

281. The term unequivocal is defined by Black as "clear . . . and, when used with reference to the burden of proof, it implies proof of the highest possible character and it imports proof of the nature of mathematical certainty." BLACK'S LAW DICTIONARY 1698 (4th ed. Rev. 1968).

282. Without considering the Code's failure to articulate the relationship between the substantial step test in the attempt section and the unequivocal step test in the con-

that the drafters of the Code did not intend such a radical change in the anticipatory offenses,[283] the unequivocal step requirement either should be deleted or clearly defined to eliminate this ambiguity.

VI. HOMICIDE

The homicide section of the Proposed Code makes several changes in the present law, the most important of which may be summarized as follows: (1) murder is made a degreeless crime; (2) the availability of defenses to murder is significantly increased; (3) only four instances are specified in which a jury can return a special verdict of death; (4) manslaughter, instead of being a catchall provision as under present law, is graded into three offenses reflecting some changes in sentencing from present equivalent offenses.

A. Murder

Under the Proposed Code an individual is guilty of murder if he (1) intentionally causes the death of another person; (2) recklessly causes the death of another person under circumstances manifesting an extreme indifference to human life; or (3) recklessly causes the death of another person while committing or attempting to commit a forcible felony.[284] This provision incorporates the essential elements of the prior law while eliminating anachronistic terminology such as "depraved mind" and "premeditation."

Under the present law,[285] the unjustifiable and unexcusable killing of a human being is murder in the first degree when committed with a "premeditated design to effect the death of another." Second degree

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spiracy provision, the reporter of the Proposed Code assumes that in the Code, as drafted, conspiracy is much closer to mere preparation than is attempt and thus is less dangerous. R.W.C.C. § 9A.28.030, Comment at 111. Hence the Proposed Code grades conspiracy as a less severe offense than attempt. *Compare* R.W.C.C. § 9A.28.030(3) *with* R.W.C.C. § 9A.28.010(3).

The Proposed Code also prevents multiple convictions on the basis of the same course of conduct. This provision goes to both completed offenses and the other anticipatory offenses. *See* R.W.C.C. § 9A.28.050.

283. That the intent of drafters was not to change the order of completion of the anticipatory offenses is implicit in their statement that "conspiracy is . . . much closer to mere preparation than completion of a criminal object, and is also further away from completion than attempt . . . ." R.W.C.C. § 9A.28.030, Comment at 111.

284. R.W.C.C. § 9A.32.020(1).

285. WASH. REV. CODE § 9.48.030(1) (1959).

murder exists when all the first degree elements except premeditation are proven. The present first degree murder statute has been construed to require a "specific intent"[286] to kill and is therefore substantially equivalent to intentional murder under the Proposed Code.[287] However, the relationship between the existing second degree murder statute and the Proposed Code is not so clear. Although the term "intent" commonly has been associated with and used in informations charging a defendant with second degree murder,[288] the present definition of "intent" is much broader than the Proposed Code's definition[289] because the courts have construed the mental state requirement for second degree murder as the equivalent of knowledge under the Proposed Code.[290] However, the Proposed Code does not include the mental state of knowledge in the murder section. Absent compensating provisions elsewhere in the Code, the result could be that a number of presently obtainable second degree murder convic-

286. R.W.C.C. § 9A.08.020(2)(a), Comment at 32, *citing* State v. Louther, 22 Wn.2d 497, 156 P.2d 672 (1945).

287. R.W.C.C. § 9A.32.020(1)(a).

288. *See* State v. Willis, 67 Wn.2d 681, 409 P.2d 669 (1966); State v. Brown, 178 Wash. 588, 35 P.2d 99 (1934). Every intentional killing *must* be classified as either first or second degree murder. State v. Cooley, 165 Wash. 638, 5 P.2d 1005 (1931).

289. R.W.C.C. § 9A.08.020(2)(a) states:

> A person intends or acts intentionally or with intent to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish such a result or to engage in conduct of that nature.

For additional discussion of the "intent" mental state under the Proposed Code, see the section on principles of liability and responsibility in this comment.

290. A host of Washington decisions have language to the effect that "one intends the natural and probable consequences of his actions." *See, e.g.*, State v. Dolan, 17 Wash. 499, 50 P. 472 (1897); State v. Davis, 72 Wash. 261, 130 P. 95 (1912); State v. Willis, 67 Wn.2d 681, 409 P.2d 669 (1966). Compare the above phrase with R.W.C.C. § 9A.08.020(2)(b)(i) which states that a person acts with knowledge when "he is aware that it is substantially certain that his conduct will cause such result. . . ." The proposed definition of knowledge and the phrase from Washington case law cited above become even more harmonious because of the courts' determination that the "natural and probable consequences" of an act are not enough to prove specific intent as a separate element. *See* State v. Louther, 22 Wn.2d 497, 156 P.2d 672 (1945). So too, a finding of the culpable state of knowledge will not support a conviction for an offense which requires intent. R.W.C.C. § 9A.08.020(4). *See* State v. Myers, 53 Wn.2d 446, 334 P.2d 536 (1959).

It appears, moreover, that "premeditation," as that word is used in Washington, is substantially equivalent to "intent" under the Proposed Code. This follows from looking at premeditation as the equivalent of specific intent. Premeditation, like specific intent, must be proven as a separate element of the crime, and may involve no more than a moment of time. State v. White, 60 Wn.2d 551, 374 P.2d 942 (1962). In this regard, compare *White* with *Louthar, supra*. *White* involved premeditation and *Louthar* discussed specific intent, and the two seem compatible.

tions would rise no higher than second degree manslaughter under the Proposed Code.[291]

However, the absence of "knowledge" as a culpable mental state in the murder and first degree manslaughter provisions is arguably not a defect in the statutes since any murder for which knowledge is the mental state could be prosecuted under the reckless murder provision.[292] But such a conclusion leads to the anomalous result that intentional murder is a redundant section, since it too would be included in the reckless murder section.[293] The essence of the problem is whether there is a difference in actus reus between intentional murder and reckless murder.[294] If there is, and the intentional murder section is not redundant, then knowledge ought to be added to intent in the intentional murder section and in the first degree manslaughter section. The drafters did not indicate why they deviated from the Model Penal Code which designates as murder both killings done purposely[295] (intentionally) and *knowingly*. The Proposed Code ought to include the mental state of knowledge in order to prevent any possible automatic downgrading of murder offenses to second degree manslaughter and to eliminate what is at best a potential source of confusion for the court.

The proposed reckless murder provision does not differ significantly

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291. Neither murder nor first degree manslaughter explicitly contains the culpability of knowledge (R.W.C.C. § 9A.08.020(2)(b)) which lies between intent and recklessness. If the courts do not read "knowledge" into the reckless murder provision (indeed, in a properly drafted statute they should not have to) then it follows that second degree manslaughter is the highest offense for which a "knowing" defendant could be convicted, since it is the highest offense remaining for which one could be convicted without the mental state of intent.

This means that the effect on the plea bargaining would be substantial. There is a mighty jump in culpability from recklessness to intent. Hence, if the culpability seems 60/40 against intent, and if "knowledge" is not available to fill the gap, recklessness as the measure of culpability and second degree manslaughter as the crime may well be settled for by the prosecution in case after case to avoid the possibility of being unable to prove intent and thereby exculpating the defendant. *See* note 322 and accompanying text *infra*.

292. R.W.C.C. § 9A.32.020(1)(b). R.W.C.C. § 9A.08.020(4): "When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly."

293. R.W.C.C. § 9A.08.020(4).

294. Under the Code, the actus reus specified for first degree murder is that the actor "cause the death of another," while that specified for second degree murder is that the actor "engage in conduct which creates a grave risk of death to another person, and thereby cause the death of another person. . . ." R.W.C.C. § 9A.32.020. One can only speculate whether there is any substantive difference between these two elements.

295. M.P.C. § 201.2(1)(a). The mens rea of "purpose" in the Model Penal Code is the equivalent of intent in the Proposed Code. *See* note 290 *supra*.

from present law.[296] However, the present requirement that the act be "imminently dangerous to others" is changed in two respects by the Proposed Code. First, the Code expressly extends the application of the provision to situations where only one life is threatened rather than several.[297] Second, the proposed provision applies only when the act creates a grave risk of death, a requirement not imposed under the present statute.[298]

The Proposed Code restricts felony murder to those killings which occur in connection with "forcible felonies,"[299] whereas the present law designates a number of felonies, including arson[300] and larceny,[301] which are subject to the felony murder rule.[302] A "forcible felony" is defined in the Code as "any felony which involves the use or threat of physical force or violence against any person."[303] This definition is ambiguous in that it does not specify whether the Code's definition of the felony or the actor's conduct in committing the felony on a particular occasion should be used in determining if the felony "involves the use or threat of physical force or violence against any person."[304] To illustrate: under the Code[305] arson can be committed without the use or

296. *Compare* WASH. REV. CODE § 9.48.030(2) (1961): "imminently dangerous to others," "regardless of human life," and "evincing a depraved mind," *with* R.W.C.C. § 9A.32.020(1)(b): "grave risk of death to another person," "extreme indifference to human life," and "recklessly engages."

297. *See* R.W.C.C. § 9A.08.020, Comment at 118. The present statute applies only to cases where the danger is to more than one person. State v. Mitchell, 29 Wn.2d 468, 188 P.2d 88 (1947).

298. *See* note 296 *supra*. Oregon does not include the element of grave risk of death in its murder statute. ORE. REV. STAT. § 166.115 (1)(a) (1971). Hence, one can be convicted of murder without such a showing. On the other hand, Connecticut places conduct described in R.W.C.C. § 9A.32.020(1)(b) in its first degree manslaughter provision. CONN. GEN. STAT. ANN. § 53a-55(a)(3) (Special Pamphlet 1972).

299. R.W.C.C. § 9A.32.020 (1)(c).

300. WASH. REV. CODE § 9.48.030 (3) (1959).

301. *See* State v. Clark, 26 Wn.2d 160, 153 P.2d 297 (1944).

302. Moreover, under present law, death which occurs in connection with any felony other than those listed in WASH. REV. CODE § 9.48.030 (3) (1959) is second degree murder. WASH. REV. CODE § 9.48.030 (2) (1959). Under the Proposed Code, second degree murder is eliminated along with second degree felony-murder. It appears, however, that there has been no conviction in Washington which has been appealed for a non-forcible felony-murder under that statute, so its elimination is not of practical significance. The closest case to come up on appeal was State v. Diebold, 152 Wash. 68, 277 P. 394 (1929) in which the act of returning a stolen car was not sufficiently within the *res gestae* of the felony to cause the death resulting therefrom to become felony-murder. The difficulty, of course, is the lack of any concrete knowledge of convictions which may *not* have been heard on appeal.

303. R.W.C.C. § 9A.04.130(10).

304. For a discussion of the two approaches, *see* W. LAFAVE & A. SCOTT, CRIMINAL LAW 547-48 (1972).

305. R.W.C.C. § 9A.48.010-.030.

threat of physical force or violence and therefore would never be a forcible felony if the Code's definition of the crime controls. On the other hand, a particular defendant may commit arson and, in so doing, use force or violence against another; as for this particular defendant, arson would be a forcible felony if the conduct of the particular defendant controls. Under this latter alternative,[306] any felony could potentially fall within the scope of the felony murder doctrine. The drafters should eliminate this ambiguity by disclosing which of the above alternatives was intended.

Additionally, under the Proposed Code, one can avoid conviction under the felony murder rule by proving by a preponderance of the evidence four separate conditions.[307] In substance these conditions require the defendant to prove that he was not aware nor did he have any reasonable ground to be aware that any participant in the crime was going to engage in conduct likely to cause death or serious physical injury. If the defendant can accomplish the very difficult task of proving this defense, he can then be convicted only of the underlying felony. This allows a defense not presently available for the "innocent" participant in the felony who had nothing to do with the death.[308]

1. Defenses to Murder

Perhaps the most significant change in the homicide section of the Proposed Code is the "extreme emotional disturbance" defense to

306. W. LAFAVE & A. SCOTT, *supra* note 304, are proponents of the view that the behavior of the particular defendant is determinative.

307. R.W.C.C. § 9A.32.020(1)(c)(i)-(iv).

308. Under present law all participants are liable for prosecution under the felony murder rule regardless of the mental state of the participants involved. WASH. REV. CODE § 9.48.030(3) (1959). The Proposed Code is aimed at restricting the felony murder rule to punishing culpable conduct, and thereby avoiding what would otherwise be a kind of strict liability. R.W.C.C. § 9A.32.020, Comment at 119.

The logic of narrowing the felony murder rule appears to be that the culpability of the individual causing the death ought to be closely tied to the manner in which the felony is being committed, *i.e.*, forcibly. It is designed to deter the use of dangerous means in committing felonies. *Id.*, at 118. The approach of the Proposed Code is novel in that the forcible/non-forcible distinction has not been used in this pure sense by the Model Penal Code or by any other jurisdiction except Illinois. *See* ILL. STAT. ANN. § 38.9-1(a)(3) (Smith-Hurd 1972). For instance, the Model Penal Code, New York, Oregon, Connecticut, and Michigan all include arson, which is a non-forcible felony, in their felony murder provisions. M.P.C. § 210.2(1)(b) (commission of felony creates a rebuttable presumption of recklessness); N.Y. PENAL LAW § 125.25(3) (McKinney 1967); ORE. REV. STAT. § 163.115(1)(c) (1971); CONN. GEN. STAT. ANN. § 53a-54(a)(2) (Special Pamphlet 1972); MICH. REV. CRIM. CODE § 2005(1)(a) (Final Draft 1967).

murder.[309] It is an affirmative defense that "the defendant acted under extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as the defendant believed them to be."[310] This formulation of the defense represents a compromise between the objective "reasonable man" test and a purely subjective standard. The compromise involves a two-step test: first, the jury must place itself in the position of the defendant under circumstances as the defendant subjectively believed them to be, and second, it must make an objective determination as to the reasonableness of the defendant's actions under those circumstances. Thus the proposed defense is available to the defendant who holds an unreasonable belief as to the nature of the circumstances under which he acts so long as the act itself is reasonable based on that belief.

Although the test is sound in theory, it may be difficult to apply.[311] It is not entirely clear to what extent the subjective, personal characteristics of the defendant are to be read into his "situation," and the drafting of understandable jury instructions may prove difficult.[312]

It is also an affirmative defense to a murder prosecution under the Code that one has not used undue influence, duress or deception in aiding the commission of a suicide. This defense does not change pre-

309. R.W.C.C. § 9A.32.020(2) (a). Under the present law, a defendant must in all cases be convicted of first or second degree murder if he intended to cause death. State v. Palmer, 104 Wash. 396, 176 P. 547 (1918).

310. R.W.C.C. § 9A.32.020(2)(a).

311. "Emotional disturbance" is not a defined term. M.P.C. § 201.3, Comment (Tent. Draft No. 9, 1959) and R.W.C.C. § 9A.32.030, Comment, indicate that it is intended at least to make viable again the "irresistible impulse" or "heat of passion" defense. But the term "extreme emotional disturbance" does not carry any necessary connotation of heat of passion or any measure of suddenness. Indeed, the term could be used to refer to a very disturbed individual who, because of his past experiences and upbringing was "extremely emotionally disturbed" at the time of the crime. There is nothing in the language of the statute or the comments to indicate that the circumstances surrounding the crime per se delimit the term.

312. Perhaps to avoid this difficulty, the Oregon legislature rejected a test similar to that contained in the Proposed Code and substituted a test requiring not only that the defendant's actions be reasonable, but also that the beliefs on which his actions are based be reasonable. *See* ORE. REV. STAT. § 163.125 (1971).

In addition to restricting the defense itself, the Oregon legislature included a provision under which "the defendant shall not introduce in his case in chief expert testimony regarding extreme mental or emotional disturbance under ORS 163.125 unless he gives notice of his intent to do so." ORE. REV. STAT. § 163.135 (1971). The Washington Proposed Code contains no such provision.

sent Washington law.[313] The successful assertion of either of the affirmative defenses to murder does not preclude prosecution and conviction for manslaughter.[314]

2. *The Death Sentence*

The recent United States Supreme Court decision in *Furman v. Georgia*,[315] raised substantial and as yet unanswered questions as to what criteria, if any, are constitutionally acceptable for the imposition of the death penalty. The entire provision of the Proposed Code dealing with the death penalty is constitutionally suspect in light of this decision. In addition, one of the four situations in which the Code provides that the death penalty may be returned by the jury—[316] that of allowing the death penalty when a public official is killed—is open to substantial criticism both because the term "public official" is not defined and because no reason for the separate treatment of that offense is provided.[317] In other respects, the proposed sentencing provi-

313. R.W.C.C. § 9A.32.020(2)(b) is substantially the same as WASH. REV. CODE § 9.80.030-.040 (1959).

314. R.W.C.C. § 9A.32.020(2).

315. 92 S. Ct. 2726 (1972).

316. R.W.C.C. § 9A.32.025(2) provides that a special verdict of death may be returned in any of the following situations:

> In every trial for murder, if the court finds it relevant, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether (i) the victim of the crime was a peace officer who was killed in the course of performing his official duties, or (ii) at the time of the commission of the crime the defendant was imprisoned in a state penitentiary or was otherwise in custody upon a sentence for murder for the term of life, or upon a sentence for murder commuted to the term of life, or having escaped from such imprisonment or custody the defendant was in immediate flight therefrom, or (iii) the victim of the crime was a public official, or (iv) the defendant had solicited another to commit the murder, or had committed the murder pursuant to an agreement that he receive money or other thing of value in return for committing the murder.

317. This provision raises numerous problems. It is not clear whether the term "public official" includes both elected and appointed officers. Since governmental agencies are by definition public, arguably *all* employees of those agencies are public officials. It also is unclear whether a "public official" continues in that capacity twenty-four hours a day or just while engaging in official duties. Note that a police officer must be performing his official duties to qualify. R.W.C.C. § 9A.32.025(2)(a)(i).

If the reason for the classification is that public officials are newsworthy and in the public eye, then there are a host of individuals who are not public officials but who are much better known than most government functionaries. Also, it appears that candidates for public office will not qualify as public officials unless they otherwise held public office at the time of their candidacy. If the criterion for special treatment is service to the public, then employees of charitable organizations are equally qualified. It should be clear that this category raises tremendously complex moral problems as well as problems of legal interpretation.

sion is similar to present Washington law in prescribing life imprisonment for the crime of murder where the death penalty is not imposed.[318]

B. Manslaughter

1. First Degree Manslaughter

The first degree manslaughter provision[319] is not likely to be used often as a substantive offense under which a defendant initially will be charged, because it involves problems of proof nearly identical to the intentional murder provision.[320] Both sections involve crimes requiring intent. The only difference between them is that the latter requires an intent to kill while the former requires an intent to cause serious bodily injury. This distinction is difficult to draw since in both cases death has occurred and intent must be proven.[321]

Hence, one can expect that a charge of murder will be filed in any case where there are grounds for believing the killing to have been intentional, since the jury can always convict the defendant of the lesser included offense of first degree manslaughter.[322] Moreover, the

318. R.W.C.C. § 9A.32.025(1) is equivalent to WASH. REV. CODE § 9.48.030(4) (1959).

319. R.W.C.C. § 9A.32.030. The proposed crime is as follows:

(1) A person is guilty of manslaughter in the first degree when (a) with intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (b) with intent to cause the death of another person, he causes the death of such person or a third person under circumstances described in subdivision 9A.32.030(2)(a).

320. R.W.C.C. § 9A.32.020(1)(a).

321. For instance, in the two cases cited by the comments to R.W.C.C. § 9A.32.030 to support the thesis that the present law comports with the Proposed Code, both defendants were charged originally with murder and the juries returned manslaughter verdicts. *See* State v. Lewis, 80 Wash. 532, 141 P. 1025 (1914); State v. Barbour, 149 Wash. 440, 271 P. 64 (1928). *Lewis* clearly involved the element of intent. It is not clear whether *Barbour* did, but there is language in the opinion which could be so construed. To the extent that those cases involved manslaughter convictions for intentional killings, they are no longer good law. *See* note 288, *supra*.

322. However, even if the evidence warranted it, the jury could *not* return a verdict of second degree manslaughter or criminally negligent homicide if the defendant were charged with an intentional killing if the present distinction between intentional and non-intentional killing is preserved. Present law holds that if there is *some* intent (which is broader than, but includes, specific intent) involved in a killing, the conviction must be of murder in one of its degrees or *nothing*, and one cannot be convicted of manslaughter, since manslaughter is committed *without* a design to effect death. State v. Cooley, 165 Wash. 638, 5 P.2d 1005 (1931); State v. Palmer, 104 Wash. 396, 176 P. 547 (1918). The Proposed Code does not discuss the potentiality of downgrading a charge of intentional killing to an offense for which intent would not be required, *i.e.*, second degree manslaughter and criminally negligent homicide. This oversight may breed needless litigation.

filing of murder charges would enhance the plea-bargaining power of the prosecution more than a charge of first degree manslaughter.

Section 9A.32.030(1)(b) provides that a person may be convicted of first degree manslaughter if he commits an act which would be murder but for the success of the extreme emotional disturbance defense.[323] A person so convicted is guilty of first degree manslaughter.[324]

The first degree manslaughter provision will probably serve primarily the same function as second degree murder now serves. Those defendants who appear to the jury not to be sufficiently culpable to be convicted of murder may be found guilty of the lesser included offense of first degree manslaughter. First degree manslaughter will operate as a safety valve for downgrading murder rather than a substantive offense under which charges will be brought.

2. *Second Degree Manslaughter*

The Proposed Code defines second degree manslaughter as: (a) recklessly causing the death of another person; or (b) intentionally aiding another person to commit suicide without the use of undue deception, duress or influence.[325] This provision would not effect any significant changes in present Washington law, as there have been equivalent dispositions under the present manslaughter statute in cases involving arguably reckless conduct.[326]

C. *Abortion*

The Proposed Code contains no section expressly dealing with the killing of a quick child, yet the Code repeals the present Washington

323. R.W.C.C. § 9A.32.020(2)(a). *See* notes 309-314 and accompanying text *supra*.

324. Thus it should be noted that the defendant who succeeds in establishing the severe emotional disturbance defense still may be sentenced to up to twenty years in the state penitentiary. R.W.C.C. § 9A.32.030(2). The twenty year maximum is the same as under present law, WASH. REV. CODE § 9.48.060 (1959), but the maximum fine under the Code is increased from the present $1,000 to $10,000.

325. R.W.C.C. § 9A.32.040.

326. *See* State v. Fry, 39 Wn.2d 8, 234 P.2d 531 (1951) (Fry cut a power line which fell and killed a man, and was sentenced to a minimum of eighteen months and a maximum of twenty years); State v. Karsunky, 197 Wash. 87, 84 P.2d 390 (1939) (an unlicensed healer tried to treat diabetes without drugs and was charged with gross negligence in causing the death of the diabetic); State v. Hopkins, 147 Wash. 198, 265 P. 481 (1928) (dictum). As the comments to R.W.C.C. § 9A.32.040 note, it should not change the present law of aiding or abetting suicide. R.W.C.C. § 9A.32.040, Comment at 139.

statute on the subject.[327] Thus the killing of a quick child, if it is to be made criminal at all, must be covered by either the murder or manslaughter sections of the Code. However, the proposed murder and manslaughter sections apply only to the killing of "persons" and "person" is defined as a "natural person."[328] If the term "natural person" includes the quick child, and it is not entirely clear that it does,[329] then there is no need for a separate statute dealing with the offense. This possible source of confusion could be eliminated by expressly including the quick child within the definition of "person" and punishing the killing as first degree manslaughter, as do other states.[330]

D. Criminally Negligent Homicide

A person is guilty of criminally negligent homicide under the Proposed Code when, with criminal negligence, he causes the death of another person.[331] This is a significant departure from the present Washington law under which one can be convicted of manslaughter for negligently causing death.[332] The proposed criminal negligence standard eliminates proscription of mere negligence and requires more significant deviation from the standard of the reasonable man,[333] *i.e.*, criminal negligence.

An exception in current Washington law to the ordinary negligence culpability for manslaughter is homicide by a motor vehicle, but that is a function of the statute rather than a judicially created exception to the rule.[334] The drafters of the Code state that the present vehicular

327. Washington presently has two abortion statutes, one dealing with the non-quick child, WASH. REV. CODE ch. 9.02 (Supp. 1971), and one dealing with the quick child, WASH. REV. CODE §§ 9.48.070-.080 (1959). The latter sections are repealed by R.W.C.C. § 9A.92.010(b).

328. R.W.C.C. § 9A.04.130(17).

329. However, the fact that the Proposed Code does not define "person" as one who is "born and alive," as do other codes, suggests that a quick child would be included. *See, e.g.*, MICH. REV. CRIM. CODE § 2001 (Final Draft 1967).

330. *See, e.g.*, N.Y. PENAL LAW § 125.20(3) (McKinney 1967).

331. R.W.C.C. § 9A.32.050. Criminal negligence is defined as a "gross deviation from the standard of care that a reasonable man would exercise in the situation." R.W.C.C. § 9A.08.020.

332. *See* State v. Ramser, 17 Wn.2d 581, 136 P.2d 1013 (1943) (gross negligence need not be shown to sustain manslaughter conviction); State v. Hedges, 8 Wn.2d 652, 113 P.2d 530 (1941) (simple negligence in shooting fellow hunter sustained conviction for manslaughter); *see also* State v. Brubaker, 62 Wn.2d 964, 385 P.2d 318 (1963).

333. *See* note 331 *supra*.

334. WASH. REV. CODE § 46.61.520 (1959). The statute itself used the term "reckless" and describes behavior which is tantamount to recklessness in connection with the

homicide statute will be retained and that under the Code criminally negligent homicide does not apply to homicides involving motor vehicles.[335] In addition, the Proposed Code eliminates the lenient one-year county jail term presently available for a manslaughter conviction.[336]

VII. ASSAULT

The assault chapter of the Proposed Code is an attempt to define assault clearly and to modernize existing assault provisions.[337] The Code's definitional approach to the offense is strikingly different from present law, but there probably will not be any drastic differences operationally. In essence, the Proposed Code requires a common law "battery" for every assault offense, and the battery must cause some sort of physical injury.[338]

The most striking feature of the Proposed Code is its apparent "result orientation." In keeping with the predominant theories of modern penal law, the general philosophy of the Proposed Code is that of-

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crime. Thus the language of the statute calls for a higher level of culpability than does the general manslaughter statute, WASH. REV. CODE § 9.48.060 (Supp. 1970). *See* State v. Eike, 72 Wn.2d 760, 435 P.2d 680 (1967).

335. *See* R.W.C.C. § 9A.32.050, Comment at 141.

336. WASH. REV. CODE § 9.48.060 (Supp. 1970) is eliminated by R.W.C.C. § 9A.92.010(b)(68) and by the failure to include it in the manslaughter provisions of the Proposed Code. The elimination of the lenient sentence is consistent with the higher culpability requirement imposed.

337. R.W.C.C. §§ 9A.36.010-.070.

338. At common law, assault and battery were two separate crimes, with battery requiring an unauthorized touching and assault being the attempt to touch. Conceptually, assault should be merged in the crime of battery and the crime should be called assault or battery. Since assault was an attempted battery, attempted assault was conceptually difficult, if not impossible. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW 609 (1972). The present Washington law on assault is imprecisely drafted. Battery is not mentioned, and it is unclear whether "assault" as contemplated by the statute requires a battery, or indeed, even encompasses one. WASH. REV. CODE ch. 9.11 (1959).

Recognizing this lack of definitional clarity in the statute, the Washington Supreme Court has adopted the common law definition of assault as an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with apparent present ability to give effect to the attempt if not prevented. Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 505, 125 P.2d 681, 690-91 (1942). This definition implies that a battery is not required, thereby ignoring the consequences of the act.

Despite the merits of this conceptual framework, the court destroyed it in the same case by stating that the occurrence of an assault depends more on apprehension created in the mind of the victim than upon the intent of the assailant. *Id.*, citing Howell v. Winters, 58 Wash. 436, 438, 108 P. 1077, 1078 (1910). This was reaffirmed in State v. Rush, 14 Wn.2d 138, 140, 127 P.2d 411, 412 (1942). As a result of the case law and present statute, attempting to define assault in Washington evokes a comparison to Justice Potter Stewart's saying that he didn't know how to define obscenity but knew it when he saw it. Stewart, J. concurring in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

fenses are to be graded commensurately with the actor's state of mind; however, assault is defined as an element of culpability on the part of the actor plus a result,[339] and is graded according to both variables.[340] The reason for this anomalous result orientation is unclear.[341] The Proposed Code divides injuries into two classes depending on their

339. R.W.C.C. §§ 9A.36.010-.030. Under R.W.C.C. § 9A.36.010(1) a person is guilty of assault in the *first degree* when:

(a) with intent to cause serious physical injury to another person, he causes serious physical injury to any person; or

(b) with intent to disfigure another person seriously and permanently, to destroy, amputate or disable permanently a member or organ of his body, he causes such an injury to any person; or

(c) under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to any person; or

(d) in the course of and in furtherance of the commission or attempted commission of a forcible felony, or of immediate flight therefrom, he intentionally or recklessly causes serious physical injury to another person who is not a participant in the commission of the crime.

Under R.W.C.C. § 9A.36.020(1) a person is guilty of assault in the *second degree* when:

(a) with intent to cause serious physical injury to another person, he causes physical injury to any person; or

(b) with intent to cause physical injury to another person, he causes physical injury to any person by means of a deadly weapon or a dangerous instrument; or

(c) with intent to cause physical injury to another person, he recklessly causes serious physical injury to any person; or

(d) with intent to prevent a peace officer from performing a lawful duty, he causes physical injury to any person; or

(e) he recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or

(f) for a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness, or other physical or mental impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation.

Under R.W.C.C. § 9A.36.030(1) a person is guilty of assault in the *third degree* when:

(a) with intent to cause physical injury to another person, he causes physical injury to any person; or

(b) he recklessly causes physical injury to another person; or

(c) with criminal negligence, he causes physical injury to another person by means of deadly weapon or a dangerous instrument.

Some of the assault provisions precisely parallel the homicide statute, R.W.C.C. ch. 9A.32, thereby providing criminal penalties for the unsuccessful would-be murderer where intent to murder cannot be proven.

340. Note the interrelationship of the requirements to intend serious physical injury or physical injury and causing serious physical injury or physical injury in R.W.C.C. §§ 9A.36.010-.030. *See* note 339 *supra*. Under the Proposed Code, first degree assault is a second degree felony, second degree assault constitutes a third degree felony, and assault in the third degree is punishable as a gross misdemeanor.

341. Among the modern penal codes, Washington's Proposed Code stands alone in its result orientation. While the parallel provisions of the codes of New York, [N.Y. PENAL LAW § 120 (McKinney 1967)], Connecticut [CONN. GEN. STAT. ANN. §§ 53a-59 to 53a-64 (Special Pamphlet 1972)], and Michigan [MICH. REV. CRIM. CODE §§ 2101-2125 (Final Draft 1967)] seem superficially to be similar to Washington's, each requires that the actor's culpability match his actions. If the culpability is of a lesser degree than the result, the crime is graded at a lesser degree.

extent: physical injury and serious physical injury.[342] Generally, the offense of assault is upgraded one degree for either intent to cause the more serious injuries or actually causing them. Similarly, if the assault is committed with a deadly weapon, the basic treatment is to upgrade the offense by one degree.[343]

There seems to be a gap in the first degree assault provisions regarding use of a deadly weapon. Both the second degree and the third degree sections contain provisions which upgrade the offense one degree where a deadly weapon is involved.[344] However, where the actor uses a deadly weapon and intends serious physical harm but causes only physical harm, or where he intends only physical harm, and serious physical harm results by use of a deadly weapon, there is no provision to raise these acts to the first degree assault level.[345] Such a provision would be more consistent with the rest of the statute. This "gap" seems to be caused by what probably is too much result orientation. Anyone who can be shown to have intended serious physical injury using a deadly weapon should be punished for first degree assault, and the punishment should not depend on whether the victim was seriously injured, moderately injured, or, arguably, injured at all. The other modern codes do not have the result orientation and do not suffer from this conceptual gap.[346]

The approach embodied in the Model Penal Code [M.P.C. § 211], the Illinois code ILL. ANN. STAT. ch. 38, §§ 12-1 to 12-4 (Smith-Hurd 1961)], and, in a modified form, in the Oregon code [ORE. REV. STAT. §§ 163.165-.195 (1971)] even more clearly bases the punishment on the actor's culpability.

The Washington Proposed Code is aberrant, and its comments shed no light on why the result-oriented approach was chosen.

342. "Physical injury" and "serious physical injury" are defined in R.W.C.C. § 9A.04.130(4), (23).

343. While it is easily understood that making the penalties stiffer for using deadly weapons could be a deterrent to their use, it is not clear that causing the penalties to vary depending on the result the actor achieves will have any deterrent value at all. *See* note 341 and accompanying text *supra*.

344. R.W.C.C. § 9A.36.020(1)(b) and § 9A.36.030(1)(c). More precisely, the third degree assault provision includes the criminally negligent infliction of physical injury by means of a deadly weapon, whereas the same act without a deadly weapon is not punishable as assault.

345. However, where the actor intends physical harm and serious physical injury results through use of a deadly weapon, the actor could be punished for first degree assault under R.W.C.C. § 9A.36.010(1)(c) if his conduct occurred under circumstances manifesting an extreme indifference to human life and constituted reckless behavior that created a grave risk of death to another person. Since a "deadly weapon" by definition is "readily capable of causing death," R.W.C.C. § 9A.04.130(7), and since *intent* to cause serious physical harm would seem to satisfy the requirement of *recklessness* in the first degree assault provision, first degree assault probably could be proved under these facts. *See* R.W.C.C. § 9A.08.020(4).

346. *See* note 341 *supra*.

To its credit, the Proposed Code omits some archaic and unnecessary sections found in the present assault statute,[347] eliminates what is probably an undesirable strict liability offense,[348] merges the assault and attempt sections in an integrated conceptual framework,[349] and renames and reorders some existing offenses.[350]

A new provision which seems to be rather rigid is the crime of reck-

347. For instance, one existing provision makes it a second degree assault to wilfully assault another with a whip while armed with a deadly weapon. WASH. REV. CODE § 9.11.020(5) (1959). While this provision may have been appropriate in 1909. one doubts that it is needed now. Moreover, if a whip is construed as a "dangerous instrument," the offense can still be treated as second degree assault whether the actor is armed with a deadly weapon or not.

348. The strict liability offense of shooting another while hunting found in WASH. REV. CODE § 9.11.020(7) (1959) has been eliminated. While it may be desirable to encourage prudence while hunting, a strict liability statute seems inappropriate. Under the present law, if a person were to wear a deer head into the woods during hunting season, the hunter who shot him would be guilty of second degree assault.

349. The "assault with intent to" commit a substantive felony provisions have been eliminated to avoid duplicating the Proposed Code's attempt provisions. Under the Code, such occurrences would be treated either as an attempt to commit the substantive offense or as assault, whichever is the greater offense. Also, the present offense of mayhem, WASH. REV. CODE § 9.65.010 (1959), is merged into the assault provisions rather than being treated separately. R.W.C.C. § 9A.36.010(1)(b). The penalties are substantially the same as those provided under the present law.

350. The new crime of "menacing" has been created to cover those instances where the actor intentionally places or attempts to place another person in fear of imminent death or serious injury. Menacing applies where the actor does not cause actual physical injury. R.W.C.C. § 9A.36.040. The Code does not distinguish degrees of menacing, either in means or result. It would be difficult to make a workable distinction based on result, but where there is a deadly weapon used as a means of menacing, it would seem consistent to raise the offense to a gross misdemeanor. This section is applicable whether the actor succeeds in frightening his victim or not and is treated as a misdemeanor, whereas under present law it could theoretically be treated as a second degree assault.

The existing crime of promoting a suicide attempt, WASH. REV. CODE § 9.80.040 (1959), is included in the assault section in the Proposed Code. The present code makes no distinction as to the manner in which the actor influences the suicide and the penalty is up to ten year's imprisonment. The Proposed Code, R.W.C.C. § 9A.36.060, substantially alters the law in this area by creating two categories of this crime: if the actor promotes suicide by undue influence, duress or deception, the act is punishable as murder, or if the suicide does not result, attempted murder. Without the presence of undue influence, duress or deception, promotion of a suicide attempt is punished as a third degree felony. This proposal offers punishment which is more consistent with the actor's culpability than does present law.

Coercion is shifted to the assault section of the Proposed Code from the extortion, blackmail, and coercion chapter of the present code, WASH. REV. CODE ch. 9.33 (1959). This provision is also narrowed to encompass conduct coerced only by the three most serious threats identified in R.W.C.C. §§ 9A.56.005(11)(a), (b) and (c), and the offense is upgraded to a gross misdemeanor from a simple misdemeanor. Unfortunately, it seems that in reordering the crime, some forms of coercion were left entirely out of the Code. Specifically, the forms of threats enumerated in the theft and robbery section, R.W.C.C. §§ 9A.56.005(11)(d)-(j), other than the three enumerated above, are excluded. If the actor is not trying to force the victim to turn over property by use of these lesser threats, the extortion section will not cover the offense, because under R.W.C.C. § 9A.56.090 extortion is limited to obtaining *property* by threat. Perhaps coercion by these less serious threats should be a misdemeanor.

less endangerment.[351] This crime is designed to cover instances where a person has the requisite culpability of recklessness for an assault offense, but no injury occurs. Violation of this section is a gross misdemeanor. The major objection is that the provision does not allow for the widely variant degrees of culpability which would be subsumed under this section. New York, which passed a similar statute several years ago, chose to create two degrees of this offense, depending on the culpability of the actor and the seriousness of the risk created.[352] While all endangering acts will not fit neatly into one of these categories, having such an alternative seems preferable to the inflexible provision of the Proposed Code.

Moreover, it is not clear whether this statute applies to motor vehicles. Although the comments state that the homicide section does not apply to vehicular homicide,[353] the Code contains neither comment nor provision indicating that use of motor vehicles is excepted from the coverage of the reckless endangerment statute.[354] At first blush, including motor vehicle offenses might seem desirable as a means of discouraging reckless driving, but given the frequency of occurrence of acts which could be construed as reckless driving, and the not uncommon use of traffic citations as a source of revenue for local governments, the strong potential for abuse dictates against inclusion. As a minimum, prudence would require excepting all but the most severe offenses, leaving the usual types of reckless driving to the motor vehicle provisions.[355]

The Proposed Code does not have any provision regarding consen-

351. R.W.C.C. § 9A.36.050.

352. N.Y. PENAL LAW §§ 120.20 and 120.25 (McKinney 1967):

§ 120.20 Reckless Endangerment in the Second Degree:

A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

Reckless endangerment in the second degree is a Class A misdemeanor.

§ 120.25 Reckless Endangerment in the First Degree:

A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.

Reckless endangerment in the first degree is a Class D felony.

353. R.W.C.C. § 9A.32.050. This exception is clearly stated in the comments. *Id.*, Comment at 141.

354. An argument that the reckless use of motor vehicles is proscribed by the reckless endangerment statute is buttressed by the inclusion of motor vehicles in the Code's definition of deadly weapons. R.W.C.C. § 9A.04.130(7).

355. A logical solution would be to adopt the two separate degrees of reckless endangerment as New York has done (*see* note 352 *supra*), excepting reckless driving from the lesser degree, but including it in the greater degree of the offense.

sual assaults such as fist-fights or contact sports. This provision probably has been omitted because those codes after which this Proposed Code is patterned do not contain such a provision. However, Oregon's revised code contains a section which gives a one-degree reduction in the offense where consent was given to the assault.[356] This would cover instances of mutual combat where there really is no aggressor and each actor is equally culpable.[357] Although mutual combat should be discouraged, it seems harsh to treat each combatant as if he were the aggressor and the other merely a victim.

Finally, the felony/assault provision,[358] which apparently was put in the assault section to parallel the felony/murder rule,[359] has been limited to forcible felonies[360] and to serious physical injuries.

In conclusion, the result orientation of the section should be reviewed to be certain that it is what is desired under the new statute. The reckless endangerment provision should be modified to reflect a gradation of reckless conduct and to exclude motor vehicle offenses. The gap in the deadly weapon provision for first degree assault should be closed, and some provision should be made for an explicit defense to consensual assault.

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356. PROP. ORE. CRIM. CODE §§ 92-94, Comment at 94 (Final Draft 1970).

357. The Model Penal Code contains a separate provision, M.P.C. § 2.11, which tightly defines consent and details when it is a complete defense, rather than a mitigating factor. There is also a section in the assault provisions, M.P.C. §§ 211.1(1)-(2), which provides for a lesser penalty for simple assault where there is consent.

358. R.W.C.C. § 9A.36.010(1)(d).

359. The felony/assault provision suffers from a potentially serious conceptual difficulty in that assault itself is included in the definition of a forcible felony. *See* R.W.C.C. § 9A.04.130(10). Because of this inclusion any time a serious physical injury results from an assault and the actor possesses a mens rea of at least recklessness, the violation could be "bootstrapped" into the first degree assault section. The recklessness requirement would not be a substantial safeguard as it probably could be inferred in most assaults.

To cure the problem, assault should be specifically excluded from the operation of R.W.C.C. § 9A.36.010(1)(d). The presence of R.W.C.C. § 9A. 36.020(1)(c) is evidence that the drafters of the Proposed Code did not intend the anomalous result in the felony/assault provision, as the former provision is meaningless if assault is treated as a forcible felony which will trigger the felony/assault rule. *See* note 339 *supra* for the text of these provisions.

360. The term "forcible felony" is defined as "any felony which involves the use or threat of physical force or violence against any person." R.W.C.C. § 9A.04.130(10). This definition is ambiguous for it fails to indicate whether the Code's definition of a felony or the defendant's particular conduct controls in determining whether the felony involves the use or threat of force. If the former controls, only those felonies traditionally classified as "inherently dangerous" will be included within the term "forcible felony"; if the latter controls, any felony might be included depending upon the means used by the particular defendant in committing the felony. W. LAFAVE & A. SCOTT, CRIMINAL LAW 547-48 (1972). For discussion of an identical problem presented in the felony murder

Overall, the proposed statute promises to be a fairer, more concise, and more easily usable tool of criminal justice.

VIII. KIDNAPPING

The Revised Washington Criminal Code abolishes the death penalty for kidnapping and grades the traditional offense of kidnapping into five crimes. Under the Proposed Code one is guilty of first degree kidnapping[361] if he intentionally[362] "restrains"[363] another by secreting him or by threatening him with deadly force, intending to curtail the other's liberty and for the purpose of (1) holding the other for ransom, reward, or as hostage; (2) facilitating a felony or flight thereafter; (3) inflicting bodily harm; (4) inflicting extreme "mental distress"; or (5) interfering with any governmental function. If all the first degree elements are present except the actor did not intend one of the five proscribed purposes, the crime is second degree kidnapping.[364] If the actor, without secreting or threatening deadly force, knowingly[365] restrains another so as to expose him to substantial risk of bodily injury, he is guilty of first degree unlawful imprisonment.[366] If the actor knowingly restrains another under any other circumstances, the

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section, see the homicide section of this comment and Professor Cosway's discussion of felony murder in this volume.

361. R.W.C.C. § 9A.40.010. The Code uses the term "abduct" to describe cases involving secreting or deadly force. R.W.C.C. § 9A.40.005(2). The penalty for first degree kidnapping is a minimum of twenty years' imprisonment or a maximum $10,000 fine. R.W.C.C. §§ 9A.40.010, 9A.20.020.

362. For a definition and discussion of the term "intentionally" as used in the Proposed Code, *see* notes 59-64 and accompanying text *supra*.

363. "Restrain" is defined as restricting another's movements, without consent or lawful authority, by moving or confining him in a manner which interferes substantially with his liberty. Consent is lacking if (1) physical force, intimidation, or deception is used, or (2) the victim is under sixteen or incompetent and his parent or guardian has not acquiesced. R.W.C.C. § 9A.40.005.

364. R.W.C.C. § 9A.40.020. The comments to the New York Penal Code, N.Y. PENAL LAW § 135.20 (McKinney 1967), suggest that child stealing by a love-starved woman and abducting a woman to prevent her marriage would be examples of second degree kidnapping. *But see* note 374 *infra*.

Under the Proposed Code the maximum penalty for second degree kidnapping is ten years' imprisonment and a $10,000 fine. R.W.C.C. §§ 9A.40.020, 9A.20.020.

365. The Proposed Code defines the mental state "knowingly" in R.W.C.C. § 9A.08.020(2)(b). R.W.C.C. § 9A.08.020(3) provides that the designated mental state must exist for all material elements of the offense unless provided otherwise. This means that to be guilty of first degree unlawful imprisonment, the actor must "know" there is a substantial risk of bodily injury.

366. R.W.C.C. § 9A.40.030. Examples include cases in which one temporarily locks another in a closet knowing there is a risk of suffocation, and cases in which the second degree kidnapping affirmative defense (*see* note 369 and accompanying text *infra*) is asserted, but the child is exposed to a risk of bodily injury. This offense is deemed less

crime is second degree unlawful imprisonment.[367] Custodial interference, the last and least onerous offense, makes it unlawful to "take or entice from lawful custody" an incompetent or other person entrusted to the custody of another.[368]

The Proposed Code has adopted three affirmative defenses. The actor's voluntary release of the victim free from serious bodily injury before trial is an affirmative defense to first degree kidnapping.[369] In cases of second degree kidnapping where the victim is a relative[370] of the actor, it is an affirmative defense that the actor did not use, intend to use, or threaten deadly force, but intended only to assume custody of the victim. Similarly, in cases of second degree unlawful imprisonment where the victim is a relative of the actor and the actor's sole intent was to assume custody of the victim, it is an affirmative defense that the restraint did not include the use, intent to use, or threat of any force.[371]

The Proposed Code alters the existing law in a number of ways. First, it abolishes the death penalty.[372] Second, it rejects the tradi-

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onerous than kidnapping because the restraint does not involve secreting the victim or using deadly force.

Under the Proposed Code the maximum penalty for first degree unlawful imprisonment is five years' imprisonment and a $5,000 fine. R.W.C.C. §§ 9A.40.030, 9A.20.020.

367. R.W.C.C. § 9A.40.040. Under the Proposed Code the maximum penalty for second degree unlawful imprisonment is one year's imprisonment and a $1,000 fine. R.W.C.C. §§ 9A.40.040, 9A.20.020.

368. R.W.C.C. § 9A.40.050. Custodial interference has a maximum penalty of ninety days' imprisonment and a $500 fine if a relative is enticed with the sole intent of assuming custody; otherwise the maximum penalty is one year's imprisonment and a $1,000 fine. R.W.C.C. §§ 9A.40.050, 9A.20.020.

369. R.W.C.C. § 9A.40.010(2). If this defense is not available and the victim has been seriously injured, the actor is still encouraged not to kill the victim because under the Code one can be punished for both kidnapping and murder. If this defense is successfully asserted, the defendant may still be found guilty of second degree kidnapping.

370. A "relative" is defined as an "ancestor, descendant, sibling, uncle or aunt, including a relative of the same degree through marriage or adoption, or a spouse." R.W.C.C. § 9A.40.005(3).

371. R.W.C.C. §§ 9A.40.020(2), 9A.40.040(2). The effect of these two defenses is to put primary emphasis on the amount of force used when a relative is restrained with the sole intent of assuming custody. If the force is deadly, the offense will be kidnapping; if nondeadly force is used, then unlawful imprisonment is established; and if no force is used, the crime will be custodial interference. The rationale given for these defenses is that the criminal law should not be used to resolve child custody disputes; such problems are better handled by the divorce and family courts. The defenses are applicable only where the actor's sole intent is to assume custody; presumably it would not apply where the actor has another intent, such as vengeance toward the other parent.

372. There is no practical significance to this change in light of the Supreme Court's recent decision in Furman v. Georgia, 92 S. Ct. 2726 (1972), holding (5-4) that imposition of the death penalty in the cases before the Court, which involved first degree

tional view expressed in Washington's present law that kidnapping should be graded into two degrees,[373] with the first degree punishing all willful restraints where there is an intent to obtain a reward[374] and the second degree punishing the actor who, not intending to obtain a reward, conceals[375] a child under sixteen or removes another from the state and thereafter secretes him within the state.[376] Third, it rejects the Washington Supreme Court's position, first formulated in *State v. Berry*,[377] that with respect to kidnapping, the actor's purpose for confining is "comparatively unimportant." Finally, the Proposed Code, by adopting a comprehensive grading system, obviates the need for specialized unlawful restraint statutes.[378]

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murder and rape, was in violation of the eighth and fourteenth amendments of the United States Constitution.

373. WASH. REV. CODE § 9.52.010 (1959).

374. The term "reward" has been construed to have a broad meaning not limited to monetary gain. In State v. Andre, 195 Wash. 221, 80 P.2d 553 (1938), the court held the benefit one received by escaping criminal arrest was sufficient "reward"; and in State v. Berry, 200 Wash. 495, 93 P.2d 782 (1939), the court suggested a "reward," within the meaning of the kidnapping statute, could be satisfaction of one's mental condition, such as vengeance for self and friends.

The term "reward" is still used in defining first degree kidnapping under the Proposed Code. If Washington continues to give this term such a broad reading, second degree kidnapping may be relegated to include few cases outside of those in which the first degree affirmative defense is available. Oregon dropped the term reward from its new code. ORE. REV. STAT. § 163.235 (1971).

375. It is not necessary that the actor actually conceal the child; an intent to conceal is all that is required. Thus, in State v. Missmer, 72 Wn.2d 1022, 435 P.2d 638 (1967), the defendant was found guilty of second degree kidnapping when he enticed a fourteen year old girl to go for a ride with him and then promptly attracted police attention by running out of gas on a freeway entrance.

376. This requirement of transporting the victim across state lines, which is clearly abolished by all modern codes, was the element of asportation at common law, which distinguished serious kidnapping from the not-so-serious false imprisonment cases. PERKINS at 177 (2d ed. 1969). The unreasonableness of this element today is evident from the rationale given for it in 4 W. BLACKSTONE, COMMENTARIES *219:

> [*k*] *idnapping,* being the forcible abduction or stealing away of a man, woman or child from their own country, and sending them into another, was capital by the Jewish Law. . . . So likewise in the civil law, the offence [*sic*] of spiriting away and stealing men and children . . . was punished with death. This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may . . . be productive of the most cruel and disagreeable hardships . . . .

The difficulties of repatriation and the fact that the victim was removed beyond the reach of the English law and the aid of his associates were other justifications for this requirement. M.P.C. § 212, Comment (Tent. Draft No. 11, 1960).

377. 200 Wash. 495, 93 P.2d 782 (1939). In this case, the defendant, under a mistaken belief that his wife had been raped, seized and confined the suspected rapist not for the purpose of extortion, but rather with an intent to put the erroneously accused rapist through torture which included emasculation.

378. Examples include WASH. REV. CODE §§ 9.79.040 (1959) (compelling a woman to marry), 9.79.050 (1959) (abduction of a female for an immoral purpose), and 9.79.060 (1959) (placing a female in a house of prostitution). All three of these offenses

By considering such variables as the actor's ultimate objective, the nature of the force used, the relationship of the parties, and the existence of secrecy, the Code drafters have sought to distinguish rationally between simple false imprisonment and the more terrifying abductions involving extortion, ransom, or physical injury. Such a grading system raises many issues, primarily involving value judgments, *to wit:* whether one who intends to interfere with a governmental function—*any* governmental function—should be held to the same degree of culpability as the extortionist; whether the actor who is clearly guilty of first degree kidnapping should be given preferential treatment (a reduction of ten years imprisonment) because he released his victim free from serious bodily injury before the police found the victim; whether the actor is less culpable because the victim was his relative—broadly defined as an ancestor, descendant, sibling, uncle, or aunt; and whether the death penalty should be abolished. Other states which have recently adopted comprehensive criminal codes have decided these issues differently.[379]

Moreover, one may question whether the terms used in defining the offenses are sufficiently precise to reflect the drafters' intent. The terms "reward," "mental distress," and "any governmental function" are used in defining first degree kidnapping,[380] an offense which apparently is intended to extend only to the most heinous abductions. However, these terms are extremely vague and, as in the case of "reward" under the present law,[381] subject to exceedingly broad constructions.

Finally, unlike the Model Penal Code and other state codes, the Proposed Code and comments fail to mention a vital issue—whether some provision should be made to prevent prosecution for first degree

would be repealed by the new Code, but WASH. REV. CODE § 9.94.030 (1959), which makes it a felony for an inmate at a state penal institution to hold an officer hostage, would not be.

379. Oregon and Illinois do not hold the kidnapper to a higher degree of culpability because his conduct interferes with a government function. New York, Illinois, and Oregon do not provide an affirmative defense to the kidnapper who voluntarily releases his victim. The Model Penal Code and Illinois do not give preferential treatment to the actor when the victim was a relative. And Connecticut and Illinois still prescribe the death penalty for the most culpable abductions. *See* ORE. REV. STAT. §§ 163.215-.257 (1971); ILL. ANN. STAT. ch. 38, § 10-2 (Smith-Hurd 1969); N.Y. PENAL LAW § 135.30 (McKinney 1967); M.P.C. § 212.1; and CONN. GEN. STAT. ANN. § 53a-92(b) (1971).

380. R.W.C.C. § 9A.40.010.

381. *See* note 374 *supra.*

kidnapping when the abduction is incident to or an integral part of the commission of another crime. Kidnapping statutes, which traditionally carry severe penalties and do not require that the victim be moved a considerable distance or be confined for a significant length of time, have frequently been abused by prosecutors to secure increased penalties against criminals whose behavior basically constitutes another crime, such as rape or robbery.[382] Perhaps with the elimination of the death penalty, the tactic will appear less attractive to the prosecutor. However, the first degree kidnapping penalties remain severe, and other state codes have felt it necessary to deal with this problem.[383] By failing to confront this issue in the Proposed Code, the drafters either consciously deemed it unnecessary, in which case their rationale should be disclosed, or inadvertently missed it, in which case prompt consideration should be given the problem.

IX. SEXUAL OFFENSES

The Proposed Code offers major changes to present Washington law in the area of sexual offenses.[384] The drafters of the Proposed Code addressed two basic problems present in existing law. First, moral proscriptions presently incorporated in sexual offense statutes serve no secular purpose and present multitudinous problems.[385]

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382. *See, e.g.*, People v. Tanner, 3 Cal. 2d 279, 44 P.2d 324 (1935); People v. Knowles, 35 Cal. 2d 175, 217 P.2d 1 (1950); People v. Chessman, 38 Cal. 2d 166, 238 P.2d 1001 (1951); People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950).

383. The Model Penal Code guards against such abuse by limiting first degree punishment to those cases where the victim is removed from his residence or business, moved a substantial distance, or confined in isolation for a substantial period of time. M.P.C. § 212.1 (Tent. Draft No. 11, 1960). New York specifies that first degree kidnapping requires the victim be held for twelve hours. N.Y. PENAL LAW § 135.25 (McKinney 1967). And Oregon sought to prevent such misuse by limiting first degree prosecutions to cases where the victim was held for ransom, as a shield, to cause physical injury, or to terrorize. ORE. REV. STAT. §§ 163.215-.257 (1971).

384. *See* R.W.C.C. ch. 9A.44. Prostitution, indecent exposure, incest, and bigamy are not covered in the sexual offense chapter; *see* R.W.C.C. ch. 9A.64 (family offenses), and R.W.C.C. ch. 9A.88 (public indecency). For statutory treatment of sexual psychopaths, *see* WASH. REV. CODE ch. 71.06 (Supp. 1971).

385. *See* notes 435, 436, 437, 440 and accompanying text *infra*. *See generally* M.P.C. § 207.5(1), Comment (Tent. Draft No. 4, 1955); 14 REPORTS FROM COMMISSIONERS, INSPECTORS AND OTHERS, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 85 [Cmnd. 247, London] (1957) [hereinafter cited as WOLFENDEN REPORT]; NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY (1969) [hereinafter cited as HOOKER REPORT]; Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?* 30 MD. L. REV. 89 (1970) [hereinafter cited as FISHER]; and Project, *An Empirical Study of Enforcement*

Second, sexual offenses, which proscribe widely variant forms of behavior and which often involve subtle psychological questions,[386] cannot be adequately dealt with under overly broad statutes which rely on subjective determinations of the victim's consent.[387]

The Proposed Code alleviates the first of these problems by abrogating criminal penalties for all sexual relations conducted between consenting adults in private[388] and thus limits the scope of criminal prohibitions to the prevention of the achievement of sexual gratification

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and Administration in Los Angeles County, 13 U.C.L.A.L. REV. 643 (1966) [hereinafter cited as PROJECT].

386. One student characterized the general behavior and proof problems inherent in sexual offenses as follows:

> The crime covers factual situations ranging from brutal attacks familiar to tabloid readers to half won arguments of couples in parked cars or intercourse with willing girls who lack legal capacity to grant consent. The "facts" may be elusive, ambiguous, or fabricated. And the sexual nature of the crime is conducive to false accusation. Moreover, the word "rape", plus the aspect of the "wronged" girl on the stand, may lead to the conviction of the defendant, "though never so innocent."

Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard,* 62 YALE L.J. 55, 56 (1952) [hereinafter cited as CONSENT STANDARD].

387. WASH. REV. CODE § 9.79.010 (1959) is the present forcible rape statute. M.P.C. § 207.4, Comment (Tent. Draft No. 4, 1955) posits that the grading of sexual offenses is especially important because:

> (1) the upper ranges of punishment include life imprisonment or death; (2) the offense is typically committed in privacy, so that conviction often rests on little more than the testimony of the complainant; (3) the central issue is likely to be the question of consent on the part of the female, a subtle psychological problem in view of social and religious pressures upon the woman to conceive of herself as a victim rather than a collaborator; and (4) the offender's threat to society is difficult to evaluate.

For critical comment on reliance on subjective elements of proof, *see* CONSENT STANDARD, *supra* note 386.

Shiff, *Statistical Features of Rape,* 14 J. FOR. SCI. 102, 107-9 (1969) relates the dilemma of a medical examiner in evaluating alleged forcible rapes. Of one hundred alleged rapes examined, only sixty-one constituted forcible rape. Motives for false accusation in this study included teaching " 'him a lesson'," avoiding punishment by parents, prostitutes' revenge for not being paid, and blackmail. *Id.* at 108.

The propensity for false accusation makes total reliance on the consent standard more suspect. One student observed:

> Simple on its face, the consent standard does not work well. Being a subjective standard requiring examination of the victim's state of mind, it is too uncertain a standard for branding intercourse a crime as serious as forcible rape. It has proved almost impossible to apply. "The major problem in regard to sexual intercourse with the use of force is to determine the degree of victim participation. . . . although a woman may desire sexual intercourse, it is customary for her to say, 'no, no, no' (although meaning 'yes, yes, yes') and expect the male to be the aggressor. . . . It is always difficult in rape cases to determine whether the female meant 'no'."

Comment, *The Resistance Standard in Rape Legislation,* 18 STAN. L. REV. 680, 681-82 (1966).

388. This position is in accord with several other modern formulations in the sexual offense area. *See* note 434 and accompanying text *infra.*

by force or its equivalent and to the protection of sexual innocence and immaturity.[389] The second basic problem is dealt with by (a) making proof depend on more objective standards; (b) adding flexibility and definition to the statutes; and (c) inserting a value structure into the statutory framework which makes penalties correspond with the gravity of the conduct.[390]

The sexual offense sections of the Proposed Code proscribe two categories of sexual conduct: rape[391] and non-consensual sexual contact.[392] Sexual contact provisions will not be analyzed in depth in this note because they utilize basically the same structure and definitions as the rape sections.[393] The Proposed Code provisions for rape require proof of sexual intercourse and lack of the victim's consent resulting from either forcible compulsion or incapacity to consent.[394] Corroboration of the victim's testimony is also required.[395] Mistake of age and mistake of ability to consent are affirmative defenses to the charge of rape.[396] These prerequisites to a rape conviction under the Proposed Code will be analyzed by comparing them with present Washington requirements for conviction.

389. The Proposed Code would also proscribe sexual conduct which is offensive to innocent bystanders. *See* R.W.C.C. § 9A.88.010 (public indecency).

390. R.W.C.C. ch. 9A.44.

391. R.W.C.C. §§ 9A.44.040-.060. *See also* R.W.C.C. §§ 9A.44.005-.020 for related provisions.

392. R.W.C.C. §§ 9A.44.070-.090.

393. Non-consensual sexual contact is presently covered by WASH. REV. CODE § 9.79.080 (1959) (indecent liberties). A person is guilty who takes any indecent liberties with a "female of chaste character" without her consent. If the female is less than fifteen years old, the crime is a felony punishable by up to twenty years; otherwise the crime is a gross misdemeanor. The Proposed Code creates three degrees of sexual contact: first degree sexual contact includes sexual contact by forcible compulsion, when the victim is physically helpless, or when the victim is less than eleven; for second degree sexual contact the victim must be mentally defective, mentally incapacitated, or less than fourteen; third degree sexual contact is any non-consensual sexual contact. First degree sexual contact is punishable by a minimum of ten years; second degree, five years, third degree, ninety days. R.W.C.C. §§ 9A.44.070-.090. The major functional difference between sexual contact and rape is the mens rea requirement that the non-consensual sexual contact be made "for the purpose of gratifying the sexual desire of either party." R.W.C.C. § 9A.44.005(2).

394. R.W.C.C. §§ 9A.44.030-.060 (basic rape provisions), R.W.C.C. § 9A.44.005 (definitions).

395. R.W.C.C. § 9A.44.010.

396. R.W.C.C. § 9A.44.020. Mistake of age is not a defense if the victim is less than fourteen. *Id.*

A. Conduct Proscribed

The first element of the crime of rape is that the actor have sexual intercourse with another person.[397] Sexual intercourse under the Proposed Code includes both normal heterosexual coitus and "sexual conduct between persons not married to each other involving the sex organs of one person and the mouth or anus of another."[398] The rape sections of the Proposed Code thus include both traditional heterosexual and homosexual rape; both categories of conduct are afforded similar treatment throughout the sexual offense sections.[399] Sexual intercourse in heterosexual rape under present Washington law is defined in the same way as under the Proposed Code, except that rape as currently defined requires a female victim.[400] In comparison, the Proposed Code uses completely neutral terms and thus prohibits rape of a male by a female. Homosexual rape does not exist under present Washington law; consensual and non-consensual homosexual intercourse are both proscribed as sodomy.[401]

B. Lack of Consent

Although the present and proposed forcible rape provisions are superficially similar,[402] they diverge in their requirements of proof of

397. R.W.C.C. §§ 9A.44.030-.060.

398. R.W.C.C. § 9A.44.005(1). Other jurisdictions using the Model Penal Code format have defined "deviate sexual intercourse" separately. CONN. GEN. STAT. ANN. § 53a-65(2) (Special Pamphlet 1972); ILL. ANN. STAT. ch. 38, § 11-2 (Smith-Hurd 1972); N.Y. PENAL LAW § 130.00(2) (McKinney 1967). These jurisdictions also treat homosexual rape separately from heterosexual rape. *See* CONN. GEN. STAT. ANN. §§ 53a-75-77 (Special Pamphlet 1972); N.Y. PENAL LAW §§ 130.40-.50 (McKinney 1967).

The Proposed Code's consolidation of all rapes into one set of provisions simplifies the sexual offense sections and eliminates minor differences in the treatment of heterosexual and homosexual rape present in other jurisdictions.

399. The only exception to identical treatment is that the statutory age of consent for homosexual rape is eighteen years of age, whereas for heterosexual rape it is sixteen years of age. R.W.C.C. § 9A.44.015(3)(a), *as amended* (1971).

400. WASH. REV. CODE § 9.79.010 (1959). But present Washington statutory rape provisions are defined in neutral terms. WASH. REV. CODE § 9.79.020 (1959).

401. WASH. REV. CODE § 9.79.100 (1959).

402. WASH. REV. CODE § 9.79.010(2)(3) (1959) is similar to the Proposed Code in its provision that the victim's "resistance is forcibly overcome" or that the victim's resistance is prevented "by fear of immediate and great bodily harm which she has reasonable cause to believe will be inflicted on her. . . ." *Id.* However, these provisions only operate as an indicia of non-consent and are not stringent requirements for conviction. Only "sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent" need be proven. WASH. REV. CODE § 9.79.010 (1959).

lack of consent. Lack of consent, an element of all sexual offenses under the Proposed Code, results from either the actor's forcible compulsion or the victim's incapacity to consent.[403] Forcible compulsion includes either "physical force which overcomes earnest resistance" or severe intimidation involving an "express or implied" threat of serious injury, kidnapping, or unlawful imprisonment.[404] The requirement of force that "overcomes earnest resistance" should be interpreted to require an objective and independent determination of that fact.[405] This requirement is consistent with the drafter's desire to prevent conviction on false accusations in sexual offense prosecutions. Intimidation, however, requires only that the victim subjectively believe there is serious danger to himself or another.[406]

In contrast, Washington courts have construed the current forcible rape statute to require simply proof of the victim's subjective nonconsent; there need be no proof of forcible compulsion.[407] Thus under present Washington law only two elements need be proven to sustain a

403. R.W.C.C. § 9A.44.015. *Cf.* STAFF OF JOINT LEGISLATIVE COMM. FOR THE REVISION OF THE PENAL CODE, STATE OF CALIFORNIA, THE CRIMINAL CODE § 902 (1971) which eliminates the consent standard from the crime of rape and, instead, requires simply that the actor "[w]ith the intent to compel her to submit, compels her to submit to the act by the use or threat of force upon her or another person."

404. R.W.C.C. § 9A.44.005(7). The belief of the victim that he is in serious danger is not required to be reasonable. Provisions for threats to another person, kidnapping and unlawful imprisonment expand the present Washington law of forcible rape which only punishes the threat of the use of force against the victim. WASH. REV. CODE § 9.79.010(3) (1959).

405. M.P.C. § 207.4, Comment (Tent. Draft No. 4, 1955); N.Y. PENAL LAW § 130.00(8), Practice Commentary (McKinney 1967). *See generally* Comment, *The Resistance Standard in Rape Legislation,* 18 STAN. L. REV. 680 (1966).

406. R.W.C.C. § 9A.44.005(7). Using a subjective standard offers greater protection to the victim who is being intimidated and should be contrasted with WASH. REV. CODE § 9.79.010(3) (1959) which requires the victim to reasonably believe she is threatened by "immediate and great bodily harm." *See* Comment, *Sex Offenses and Penal Code Revision in Michigan,* 14 WAYNE L. REV. 934, 941 (1968) for discussion of a similar provision. To some degree intimidation arguably requires objectivity, for there must be objective proof that the actor's conduct conveyed an "implied threat." R.W.C.C. § 9A.44.005(7).

407. State v. Bridges, 61 Wn.2d 625, 628, 379 P.2d 715, 717 (1963); State v. Meyerkamp, 82 Wash. 607, 609, 144 P. 942, 944 (1914). It is conceivable that this construction could be carried over to the Proposed Code if it were enacted. This construction, however, would be contrary to the Proposed Code's policy to attempt to require objective certainty in rape prosecutions. The interpretation that there is a conflict between the Proposed Code and the present law requirements for proof of forcible compulsion is contrary to the drafter's comment that there is no conflict. R.W.C.C. § 9A.44.015, Comment. Under present Washington law, evidence of forcible compulsion and the victim's resistance is often determinative of non-consent. *See, e.g.,* State v. Thomas, 52 Wn.2d 255, 334 P.2d 821 (1958).

conviction for forcible rape: sexual intercourse and the subjective nonconsent of the victim.[408]

Incapacity to consent under the Proposed Code is established if the heterosexual rape victim is under sixteen years, if the homosexual rape victim is under eighteen years,[409] or if the victim is mentally defective,[410] mentally incapacitated,[411] or physically helpless.[412] The statutory age of consent of sixteen for heterosexual rape is a reduction from the statutory age of eighteen under the present law.[413]

C. *Corroboration*

Corroboration of the victim's testimony is required under the Proposed Code for all sexual offense convictions except sexual contact in the third degree.[414] By requiring corroboration, greater certainty of proof is provided, thus decreasing the danger of conviction after a false allegation. This requirement would be new to Washington. Convictions currently depend exclusively on the determination of the judge and jury as to the sufficiency of evidence without any strict requirement of corroboration.[415]

408. *See* State v. Bridges, 61 Wn.2d 625, 628, 379 P.2d 715, 717 (1963); State v. Meyerkamp, 82 Wash. 607, 609, 144 P. 942, 943 (1914); State v. Raymond, 69 Wash. 98, 103, 124 P. 495, 496 (1912). *See also* note 402 *supra*.

409. R.W.C.C. § 9A.44.015(3)(a), *as amended* (1971).

410. R.W.C.C. § 9A.44.015(3)(b).

411. R.W.C.C. § 9A.44.015(3)(c).

412. R.W.C.C. § 9A.44.015(3)(d).

413. WASH. REV. CODE § 9.79.020 (1959).

414. R.W.C.C. § 9A.44.010. The explicit exclusion of the corroboration requirement for sexual contact in the third degree is not explained in the comments and appears to have no rational basis. Ploscowe, *Sex Offenses in the New Penal Law*, 32 BROOKLYN L. REV. 274, 275 (1966). N.Y. PENAL LAW § 130.15 (1967) exempts sexual abuse in the third degree from the corroboration requirement. People v. Doyle, 300 N.Y.S.2d 719, *aff'd mem.*, 26 N.Y.2d 752, 257 N.E.2d 648, 309 N.Y.S.2d 199 (1970), ruled that the district attorney may not circumvent the statutory requirement of corroboration by charging a lesser or different offense for which corroboration is unnecessary. This case indicates that the exemption of third degree sexual abuse does not mean much practically in New York. For further discussion, see note 452 and accompanying text *infra*.

415. State v. Paradis, 72 Wn.2d 563, 434 P.2d 583 (1967); State v. Jennen, 58 Wn.2d 171, 179, 361 P.2d 739, 743 (1961); State v. Mobley, 44 Wash. 549, 87 P. 815 (1906).

D. Defenses

Certain limited defenses not currently available are permitted under the Proposed Code.[416] A defendant has an affirmative defense when the victim is incapable of consenting and the defendant "believed that the circumstances giving rise to such incapacity" did not exist.[417] There is no requirement that the defendant's belief be reasonable; subjective belief is the only apparent requisite for the defense. In a statutory rape prosecution, it is an affirmative defense that the defendant "reasonably believed" the victim to be the critical age if that age is sixteen or older.[418] This defense is not available, however, if the victim is in fact under fourteen years of age.[419]

E. Classification and Penalties

The Proposed Code divides rape offenses into three degrees of rape[420] and a separate, lesser included offense of sexual misconduct.[421] The basis for classification within this structure depends upon the amount of force involved, the mental and physical state of the victim, the age of the victim, and the age differential between the victim and the actor. Penalties imposed under the various offenses correspond to the relative gravity of the defendant's conduct.[422] First degree rape

416. R.W.C.C. § 9A.44.020. The defenses of mistake of age and mistake of consent operate to create a knowledge mental requirement for these two factors. The actor must know that his victim is physically or mentally capable of consenting. Other than these two mental requirements, the rest of the rape provisions apparently invoke absolute liability. The absence of stated mental requirements coupled with the absence of any specific statement that rape is an absolute liability offense seems to fall within R.W.C.C. § 9A.08.050, and may cause awkward impositions of mental requirements by the trial court.

417. R.W.C.C. § 9A.44.020(1).

418. R.W.C.C. § 9A.44.020(2)(b).

419. R.W.C.C. § 9A.44.020(2)(a).

420. R.W.C.C. §§ 9A.44.040-.060.

421. R.W.C.C. § 9A.44.030.

422. Present Washington law prescribes the following punishments: rape—minimum of five years, WASH. REV. CODE § 9.79.010 (1959); statutory rape, victim under ten—life, *Id.*, § 9.79.020 (1959); statutory rape, victim ten or older but under fifteen—maximum of twenty years, *Id.*; statutory rape, victim fifteen years or older but under eighteen—maximum of fifteen years, *Id.* The Proposed Code would punish rape defendants as follows: rape in the first degree, rape by forcible compulsion or victim less than eleven—minimum of twenty years, R.W.C.C. §§ 9A.44.040, 9A.20.020; second degree rape, victim physically helpless or less than fourteen if actor is eighteen or more—maximum of ten years, R.W.C.C. §§ 9A.44.050, 9A.20.020; rape in the third degree, victim mentally defective, mentally incapacitated or less than sixteen if actor is twenty or older —maximum of five years, R.W.C.C. §§ 9A.44.060, 9A.20.020; sexual misconduct,

proscribes sexual intercourse with another person by forcible compulsion or when the victim is less than eleven years old.[423] Second degree rape is found where the victim is physically helpless or is less than fourteen years old and the actor is eighteen or older.[424] Third degree rape exists if the victim is mentally defective or mentally incapacitated or if the victim's age is below the statutory age of consent and the actor is above a set age.[425] Finally, sexual misconduct includes all non-consensual intercourse.[426] In contrast to the Proposed Code, the present Washington forcible rape statute does not differentiate between different types of conduct and prescribes penalties of from five years to life.[427] Current law does grade statutory rape, with penalties varying with the age of the victim.[428]

A significant difference between the Proposed Code and current law is the deletion of numerous offenses. Crimes of sodomy,[429] adultery,[430] seduction,[431] and compelling a woman to marry,[432] are abolished except as they are absorbed in the basic rape provisions of the Proposed Code.

The approach to sexual offenses taken under the Proposed Code is basically different from that taken under present Washington law. By eliminating moral proscriptions, relying on objective standards, requiring corroboration, and creating a statutory framework which reflects a value structure, the Code raises fundamental policy issues as

non-consensual sexual intercourse—maximum of one year, R.W.C.C. §§ 9A.44.030, 9A.20.020.

423. R.W.C.C. § 9A.44.040.

424. R.W.C.C. § 9A.44.050.

425. Three brackets of differentials are used in defining third degree rape: (1) victim is less than sixteen and the actor is at least twenty, (2) victim is less than sixteen and the actor is the same sex as the victim and at least nineteen; (3) victim is less than eighteen and the actor is the same sex as the victim and at least twenty-one. R.W.C.C. § 9A.44.060.

426. R.W.C.C. § 9A.44.030.

427. WASH. REV. CODE § 9.79.010 (1959). The absence of distinctions between different types of conduct can lead to unduly harsh penalties. A sentence of from five years to life may be appropriate for a man who rapes a woman at knifepoint, but is overly harsh for a "back seat lover" whose companion does not technically consent. *See also* note 387 *supra*.

428. WASH. REV. CODE § 9.79.020 (1959). See note 422 *supra*, for the penalties under the statutory rape provisions.

429. WASH. REV. CODE § 9.79.100 (1959).

430. WASH. REV. CODE § 9.79.110 (1959).

431. WASH. REV. CODE § 9.79.070 (1959). The seduction statute has been used rarely if at all in recent years. Adequate protection is provided by the other sexual offense provisions.

432. WASH. REV. CODE § 9.79.040 (1959).

well as potential mechanical problems that may exist in applying its provisions.

. The major policy change is the proposal that private homosexual and heterosexual behavior between consenting adults not be proscribed. Legalization of homosexuality has been hotly debated since the Model Penal Code recommended the repeal of laws prohibiting homosexuality.[433] Pursuant to these recommendations, several states have eliminated or minimized the crime of homosexuality and other moral prohibitions in their codes.[434]

There are several persuasive reasons for eliminating legal prohibitions of consensual sexual conduct between adults in private. First, because these laws are infrequently enforced relative to the volume of homosexual activity, problems of arbitrary enforcement and police corruption exist.[435] Second, no secular harm can be shown from such conduct,[436] and third, the threat of punishment is ineffective in preventing homosexual acts.[437] Finally, the laws are practically unenforcible because the conduct is normally carried on in private.[438] Countervailing arguments include: (1) removal of such laws would remove deterrence and in effect express social approval of deviant

433. M.P.C. § 207.5(1), Comment (Tent. Draft No. 4, 1955). An additional controversial study was the WOLFENDEN REPORT, *supra* note 385 which led to the abolition of homosexual proscriptions in England in 1967. The HOOKER REPORT, *supra* note 385, is a recent exhaustive study of the problems of homosexuality which recommends elimination of criminal prohibitions for private homosexual conduct. *Id.* at 16-21.

434. *See* CONN. GEN. STAT. ANN. §§ 53a-65 to -77 (Special Pamphlet 1972); IDAHO CODE §§ 18-901 to -907 (Supp. 1971); ILL. ANN. STAT. § 11-2 (Smith-Hurd 1972); N.Y. PENAL LAW § 130.38 (McKinney 1967) (makes consensual sodomy a class B misdemeanor). *See also* STAFF OF JOINT LEGISLATURE COMM. FOR THE REVISION OF THE PENAL CODE, STATE OF CALIFORNIA, THE CRIMINAL CODE §§ 902-906 (1971), and MICH. REV. CRIM. CODE §§ 2301-2317 (Final Draft 1967).

435. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 304 (1968). In the years 1966-1969, King County reported thirteen sodomy convictions in comparison to 738 grand larceny convictions and 612 burglary convictions. PROSECUTING ATTORNEY OF KING COUNTY, 1965-69, ANNUAL REPORT. The existence of alleged arbitrary enforcement makes the claim of violation of equal protection a common one in most sodomy cases. The claim has never been accepted in Washington. State v. Rhinehart 70 Wn.2d 649, 424 P.2d 906 (1967), State v. Reid, 66 Wn.2d 243, 401 P.2d 988 (1965). *See generally* PROJECT, *supra* note 385, at 686-742; FISHER, *supra* note 385, at 95-97.

436. M.P.C. § 207.5(1), Comment (Tent. Draft No. 4, 1955) states:

> No harm to the secular interests of the community is involved in typical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities.

437. HOOKER REPORT, *supra* note 385, at 18-20. The laws are not only an ineffective deterrent; they create additional mental problems for homosexuals. *Id.*

438. PROJECT, *supra* note 385, at 686-742. A derivative of the difficulties in enforcement is the necessity of undesirable police practices. The use of decoys to lure homosexuals into making advances and the surveillance of public restrooms are typical of these

sexual conduct; and (2) relaxation of these moral standards will encourage a general relaxation of moral standards which may lead to the corruption of youth.[439] In weighing the arguments,[440] it is important to note that the Proposed Code does not remove criminal proscriptions for deviant sexual conduct that involves force or threats,[441] that is practiced with minors,[442] or that violates public decency.[443]

Another troublesome issue is the proposal to reduce the statutory age of consent from eighteen to sixteen years of age.[444] The arbitrary selection of an age of non-consent is crucial because it sets the age at which a female may consent to sexual intercourse so as to bar a charge of statutory rape. The purpose of setting this minimum age limit is to protect the child who is likely to have poor judgment concerning the meaning of sexual activity even though she is physically capable of giving and receiving sexual gratification. The drafters of the Proposed Code have concluded that today a girl of sixteen years understands the significance of sexual intercourse and that the fiction of statutory non-consent is not presently realistic.[445] This position is in accord with the majority of the other states.[446]

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practices. Additionally, the use of police manpower in morals squads detracts from overall police effectiveness in other areas of crime prevention.

Several recent cases indicate a desire to preserve individual rights of privacy. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (enforcement of criminal statute prohibiting the use of contraceptives held unconstitutional invasion of privacy); Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968), *cert. denied,* 393 U.S. 847 (1968) (application of sodomy statute to married individuals engaged in private, consensual acts might be unconstitutional invasion of privacy); Buchanan v. Batchelos, 308 F.Supp. 729 (N.D. Tex. 1970), *vacated for reconsideration,* 401 U.S. 989 (1971).

439. FISHER, *supra* note 385, at 107-108.

440. These and many other arguments on both sides have been cogently discussed in numerous works which should be considered in dealing with this problem. *See generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 301-312 (1968); FISHER, *supra* note 385, at 106-108.

441. R.W.C.C. § 9A.44.040.

442. R.W.C.C. §§ 9A.44.040-.060.

443. R.W.C.C. § 9A.88.010.

444. R.W.C.C. § 9A.44.020.

445. Ploscowe, *Sex Offenses in the New Penal Law,* 32 BROOKLYN L. REV. 274-275 (1965). *See* Reiss, *The Marginal Status of the Adolescent,* 25 LAW & CONTEMP. PROB. 309 (1960) for additional factors to be considered in setting a statutory age of consent.

446. R.W.C.C. § 9A.44.015. In 1961, twenty-four states had minimum statutory ages of consent set at sixteen years of age or lower. *G. Mueller,* LEGAL REGULATION OF SEXUAL CONDUCT 74-80 (1961). Recent enactments include: CONN. GEN. STAT. ANN. § 53a-66 (Special Pamphlet 1972) (sixteen); IDAHO CODE § 18-904 (Supp. 1971) (sixteen); ILL. ANN. STAT. ch. 38, § 11-4 (Smith-Hurd 1972) (sixteen); N.Y. PENAL LAW § 130.25 (McKinney 1967) (seventeen); and ORE. REV. STAT. § 163.315 (1971) (eighteen).

Inclusion in the Proposed Code of affirmative defenses for mistake of age and mistake of consent will also mitigate the harshness of present rape statutes. The mistake of age defense requires a "reasonable belief" by the actor that his companion was legally able to consent.[447] Mistake as to consent depends only on the actor's subjective belief that the circumstances giving rise to the victim's incapacity to consent were not present.[448] Making this defense turn only on a subjective belief will have the effect of placing an immense additional burden on the prosecution to prove the actor did not believe the victim could consent. An objective belief requirement would be more congruous with the policy of the rape provisions to protect those incapable of consenting and at the same time would provide protection where an accused "reasonably believed" his companion was capable of consent.[449]

The offense of "sexual misconduct," which is designated as a gross misdemeanor and is punishable by a maximum of one year imprisonment,[450] raises an additional issue in the prosecution of rape offenders. Sexual misconduct is non-consensual intercourse and includes all the higher degrees of rape. The existence of the offense of sexual misconduct creates a prosecutorial dilemma as to whether the rape provisions or the sexual misconduct provisions should be used in a particular case. The wide disparity between rape and sexual misconduct

447. R.W.C.C. § 9A.44.020. M.P.C. § 213.6(1) and M.P.C. § 207.4, Comment (Tent. Draft No. 4, 1955) recognize reasonable mistake of age as a defense to statutory rape, and advocate the termination of absolute liability for statutory rape. People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964), judicially allowed mistake of age as a defense to statutory rape. Implicit in the opinion is the conclusion that protecting young girls becomes a less compelling objective as the statutory age of consent increases. *See also* Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape,* 64 MICH. L. REV. 105 (1965); Note, *Mistake of Age Becomes a Defense to Statutory Rape in California,* 17 STAN. L. REV. 309 (1965). Several states have adopted mistake of age as a defense. CONN. GEN. STAT. ANN. § 53a-67 (Special Pamphlet 1972); IDAHO CODE § 18-907(1) (SUPP. 1971); ILL. ANN. STAT. ch. 38, § 11-4(b)(1) (Smith-Hurd 1972); N.M. STAT. ANN. § 40A-9-3 (1963). New York did not include mistake of age as a defense. N.Y. PENAL LAW § 130.10, Comment (McKinney 1967).

448. R.W.C.C. § 9A.44.020(1).

449. *See* Comment, *Sex Offenses and the Penal Code Revision in Michigan,* 14 WAYNE L. REV. 934, 947 (1968), which makes the same basic criticism of MICH. REV. CRIM. CODE § 2330 (Final Draft 1967).

450. R.W.C.C. § 9A.44.030. The comments following state that the purpose of the offense of sexual misconduct "is to set the basic dividing line between criminal and non-criminal conduct of both a heterosexual and homosexual nature." Sexual misconduct serves as a lesser included offense and also "penalizes voluntary heterosexual intercourse between minors who do not differ by more than six years in age, provided the younger person is more than fourteen or fifteen years old." *Id.*

penalties makes this an important issue.[451] One commentator viewed the problem as follows:[452]

> [S]exual misconduct . . . appears to be a device to make the prosecution of sex offenses easier. The prosecutor can seek an indictment for felonies . . . of rape and then reduce the charge to sexual misconduct upon the defendant pleading guilty thereto.

The availability of an easier route to conviction by using sexual misconduct could minimize the imposition of the severe penalties of the other rape sections.[453]

The Proposed Code's requirement of corroboration raises the policy question of how much protection from false accusation the legislature should give alleged rapists. Corroboration will result in a greater degree of certainty in prosecutions for sexual offenses,[454] but, depending on judicial construction of the requirement, corroboration could require so much certainty as to effectively eliminate sexual offense convictions. This has apparently been the case in New York.[455] On the other hand, corroboration has been required for sexual offenses in a number of other states without a deleterious effect.[456] The ultimate impact of a corroboration requirement in Washington will depend on what the courts determine is sufficient corroborating evi-

451. *See* note 422 *supra*.

452. Ploscowe, *Sex Offenses in the New Penal Law*, 32 BROOKLYN L. REV. 274, 280 (1965).

453. *Id.* at 281.

454. M.P.C. § 207.4, Comment (Tent. Draft No. 4, 1955) includes a corroboration requirement. New York's corroboration requirement is based on the fact that " 'crimes of this nature are easily charged and very difficult to disprove.' " N.Y. PENAL LAW § 130.15, Comment (McKinney 1967).

455. Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 BROOKLYN L. REV. 378 (1970). The author posits that in 1969 in Queens County, New York—population, 2.3 million—there have been no forcible rape convictions out of fifty-eight forcible rape indictments. *Id.* at 386. The corroboration requirement has similarly nullified the enforcement of non-sexual criminal conduct when the non-sex offense is a part of an offense which requires corroboration. People v. English, 16 N.Y. 2d 719, 209 N.E.2d 722, 262 N.Y.S.2d 104 (1965). The product of *English* and other similar cases is a "doctrine of circumvention" which precludes the prosecutor from charging a different or lesser offense for which corroboration is not required and proving this offense by the victim's uncorroborated testimony related to an offense for which corroboration is required. Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 43 FORDHAM L. REV. 263, 272 (1971).

456. Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 43 FORDHAM L. REV. 263, 263-66 (1971). Commentators have also favored some form of corroboration. *See* Ploscowe, *Sex Offenses in the New Penal Law*, 32 BROOKLYN L. REV. 274, 275 (1965); Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967).

dence. The possibility of a strict requirement of corroboration, especially in view of the drafters' reference in their comments to New York cases on corroboration,[457] raises the question of whether corroboration should be required at all.[458] The Proposed Code's requirement of objective proof of forcible rape may be enough protection for the falsely accused defendant. If the corroboration requirement is retained, the section should state more clearly what degree of corroboration is required.[459]

Additional issues pertaining to definitions and mechanics are raised by the Proposed Code. First, the definition of sexual contact[460]—"any touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying sexual desire of either party"—creates a crime which may be extraordinarily difficult to prove.[461] Second, the Proposed Code should make clear whether the definition of forcible compulsion requires an independent and objective determination that the force used would "overcome earnest resistance."[462] Third, the requirement of a prompt complaint is conspicuously absent from the sexual offense sections. The Model Penal Code and several other jurisdictions have included the requirement that action be instituted within three months after the occurrence.[463]

457. R.W.C.C. § 9A.44.010, Comment.

458. The comments to the Model Penal Code suggest that the requirement of corroboration for every element of the crime "would impose an impractical burden on the prosecutor . . . ." M.C.P. § 207.4, Comment (Tent. Draft, No. 4, 1955). Though the Model Penal Code has a corroboration requirement, it would require only some minimal evidence other than the victim's testimony. References in the comments to Dean Wigmore's statement that corroboration requirements were unnecessary because "(1) jurors are naturally suspicious of such complaints, and (2) the purpose of the rule is already attained by the court's power to set aside a verdict for insufficient evidence," had some effect on the Model Code's policy determination. *Id.*

459. *See, e.g.*, M.P.C. § 213.6(6) (corroboration may be circumstantial); CONN. GEN. STAT. ANN. § 53a-68 (Special Pamphlet 1972); IDAHO CODE § 18-907(4) (Supp. 1971). Neither Oregon nor Michigan include corroboration requirements in their revised codes. ORE. REV. STAT. §§ 163.305-.465 (1971); MICH. REV. CRIM. CODE ch. 23 (Final Draft 1967).

460. R.W.C.C. § 9A.44.005(2).

461. Comment, *Sex Offenses and Penal Code Revision in Michigan*, 14 WAYNE L. REV. 934, 960 (1968).

462. *See* note 405 and accompanying text *supra*.

463. M.P.C. § 213.6(5) (complaint must be brought within three months). M.P.C. § 207.4, Comment (Tent. Draft No. 4, 1955) expresses the rationale behind the requirement for prompt complaint:

> The possibility that pregnancy might change a willing participant in the sex act into a vindictive complainant, as well as the sound reasoning that one who has, in fact, been subjected to an act of violence will not delay in bringing the offense to the at-

In summary, the Proposed Code's treatment of sexual offenses represents a significant change from present Washington law and offers some productive innovations relative to other derivations of the Model Penal Code. The basic policy changes are in accord with modern thought in the sexual offense area; similar provisions have been adopted by several other states. With the exception of several relatively minor problems previously noted, the Proposed Code in its present form is a much needed improvement over existing Wasington law.

X. ARSON

The changes made by the Proposed Code with respect to fire-related crimes are primarily organizational. Instead of separating these crimes into two distinct chapters as is done under the present law,[464] the Code consolidates them into a single chapter. The Code's arson chapter contains four separate offenses: arson,[465] criminal mischief,[466] reckless burning,[467] and reckless endangerment of property.[468]

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tention of the authorities, are sufficient grounds for setting some time limit upon the right to complain. . . . A specific possibility of extension of time is made in the case of young children and incompetents. . . .

See also, IDAHO CODE § 18-907(3) (Supp. 1971).

464. R.W.C.C. ch. 9A.48 (arson) prohibits conduct which is currently proscribed in WASH. REV. CODE ch. 9.09 (1959) (arson) and ch. 9.40 (1959) (crimes relating to fire). R.W.C.C. §§ 9A.48.005-.040 replace WASH. REV. CODE ch. 9.09, and R.W.C.C. §§ 9A.48.050-.080 cover most of the conduct prohibited by WASH. REV. CODE ch. 9.40.

465. R.W.C.C. §§ 9A.48.010-.030.

466. R.W.C.C. §§ 9A.48.050-.070. Both first and second degree criminal mischief can be committed by performing one of two criminal actions: an intentional damaging of property of another by an actor who has no reasonable belief that he has the right to do so, or the intentional interruption or impairment of service to the public through physical damage to or tampering with the property of a public utility or mode of transportation, power or communication with no reasonable belief that the action is rightful. The difference between the two crimes is the amount of damage the actor causes. First degree criminal mischief requires damage exceeding $1,500 (R.W.C.C. § 9A .48.050(1)(a); the second degree offense requires damage in excess of $250 (R.W.C.C. § 9A.48.060(1)(a)).

First degree criminal mischief is punishable as a third degree felony, and the second degree offense constitutes a gross misdemeanor. R.W.C.C. § 9A.48.050-.060. Criminal mischief in the third degree, punishable as a misdemeanor with imprisonment in the county jail for not more than ninety days and/or a fine of not more than $500 (R.W.C.C. § 9A.20.020(3)), requires that an actor, having no reasonable belief that he has a right to do so, intentionally or recklessly cause physical damage to the property of another. R.W.C.C. § 9A.48.070.

467. R.W.C.C. § 9A.48.040. Reckless burning makes punishable intentional burnings or explodings which recklessly place property of another in danger of destruction or damage. This crime is punished as a gross misdemeanor which entails imprisonment in

This gradation of arson offenses provides more flexible and precise laws which impose sanctions appropriately reflecting the actor's culpability and the risk created by his conduct. This note will focus primarily on the crime of arson rather than the less dangerous offenses of criminal mischief, reckless burning, and reckless endangerment of property.

While the Code makes some substantive changes in the crime of arson, the essence of the crime remains the same. Deeming burnings or explosions which create a risk of danger to human life more culpable than those which merely damage property, the Code classifies and punishes the arson offenses according to the type of structure damaged and the risk of death or injury created.[469] The crime of arson has two requisite elements under the Code: (1) the intentional causation of a fire or explosion[470] and (2) resultant damage to a building.[471] The aggravating factors which raise the crime to first degree arson are essentially the same under the Code[472] and the present

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the county jail for not more than one year and/or a fine of not more than $1,000. R.W.C.C. § 9A.20.020(2).

468. R.W.C.C. § 9A.48.080. Reckless endangerment of property, punishable as a misdemeanor, requires that an actor, having no reasonable belief that he has the right to do so, recklessly endanger the property of another in an amount exceeding $250.

469. The Code retains what might be called a traditional classification of arson. The proposed California criminal code abandoned the classification of arson by degrees and classifies fire related crimes in four categories: *Aggravated Arson*—burnings or explosions of structures with the intent to injure a person or the intentional burning or explosion of a structure which in fact injures a person or damages a structure in which there is a person (STAFF OF JOINT LEGISLATIVE COMM. FOR THE REVISION OF THE PENAL CODE, STATE OF CALIFORNIA, THE CRIMINAL CODE § 1072 (1971)); *Arson*—burning or exploding a structure (*Id.*, § 1076); *Unlawfully causing a fire or explosion*—causing a fire or explosion with the intention of damaging another's property or defrauding an insurer (*Id.*, § 1078); *Unlawful possession of a flammable substance*—the unlawful possession of a flammable substance with the intent to commit aggravated arson or arson (*Id.*, § 1080).

470. By including explosions in the definition of arson, the Code eliminates problems under the present law raised in attempting to interpret the phrase "set on fire." *See* note 473 *infra*, concerning the content of the current statute. The present law recognizes that a building has been set on fire if it has been scorched, charred, or burned. WASH. REV. CODE 9.09.040 (1959).

471. A "building" under the Code is defined to include "any structure, vehicle, railway car, aircraft or watercraft used for overnight lodging of persons or for carrying on business therein." R.W.C.C. § 9A.48.005(1).

472. Under the Proposed Code, first degree arson requires that the two basic elements exist *and* that either (1) the building was occupied and the actor knew or reasonably should have known it was occupied, or if the building was in fact unoccupied, the actor knew or should have known that a person ordinarily was present, *or* (2) the burned building was a "dwelling." R.W.C.C. § 9A.48.010(1). A "dwelling" is defined as any building used "as a home or place of lodging." R.W.C.C. § 9A.04.130(8).

First degree arson is punishable as a first degree felony, subjecting the actor to imprisonment in the state penitentiary for not less than twenty years and/or a fine of not more than $10,000. R.W.C.C. § 9A.20.020(1)(a).

law.[473] The only major change is that under the Code, first degree arson need not be committed at night. This broadening of the crime is sensible and consistent with the principle that burnings which create a risk to human life should be severely punished; most buildings are occupied during the daytime, and unpredictable habitation patterns make the chances of a dwelling's being occupied during a daytime burning quite high.

The Code's second degree arson provision[474] is similar to that found under present law.[475] Under both statutes second degree arson is a crime against property alone. Curiously, the Code retains the intentional burning or exploding of hay, grain, crop or timber, whether cut or standing, as second degree arson, punishable as a second degree felony, while it relegates the intentional burning of wharves, docks, threshing machines, etc., presently included in second degree arson, to the lesser crime of criminal mischief.[476] The Model Penal Code's comments call such a dichotomy absurd,[477] and there appears to be no logical reason for maintaining it.[478] Third degree arson[479] requires

473. Under the present law, first degree arson requires that an actor either (1) willfully "burn or set on fire in the nighttime the dwelling house of another, or any building in which there shall be at the time a human being," *or* (2) willfully "set any fire manifestly dangerous to any human life." WASH. REV. CODE § 9.09.010 (1963). The first degree offense is punishable by imprisonment in the state penitentiary for not less than five years. *Id.*

474. Second degree arson requires, along with the two basic elements of arson, the intentional burning or exploding of a building or any hay, grain, crop or timber, whether cut or standing. R.W.C.C. § 9A.48.020. It is punished as a second degree felony, authorizing imprisonment in the state penitentiary for not more than ten years and/or a fine of not more than $10,000. R.W.C.C. § 9A.20.020(1)(b).

475. WASH. REV. CODE § 9.09.020 (1965). Under the current statute, second degree arson includes all willful burnings of:

> any building, or any structure or erection appurtenant to or adjoining any building, or any wharf, dock, threshing machine, threshing engine, automobile or other motor vehicle, motorboat, steamboat, sailboat, aircraft, bridge or trestle, or any hay, grain, crop or timber, whether cut or standing, or any lumber, shingle or other timber products, or other property . . . .

Second degree arson is presently punishable by not more than ten years in the state penitentiary and/or a fine of not more than $5,000. *Id.*

476. *See* note 466 *supra*.

477. M.P.C. § 220.1(1), Comment at 35 (Tent. Draft No. 11, 1960). The Model Penal Code classifies all of these burnings as criminal mischief. M.P.C. § 220.3.

478. The retention of these burnings as second degree arson was possibly motivated by the recent rash of haystack burnings in eastern Washington. One might question whether a hay burner is more culpable than a dock burner and thus whether the distinction made by the drafters can be justified.

479. Under R.W.C.C. § 9A.48.030 third degree arson is a third degree felony, punishable by imprisonment in the state penitentiary for not more than five years and/or a fine of not more than $5,000. R.W.C.C. § 9A.20.020(1)(c).

only that the actor recklessly damage a building by intentionally igniting a fire or causing an explosion. In contrast to the present statute, the Code explicitly identifies affirmative defenses for all degrees of arson.[480]

The sanctions for fire-related crimes under the Code range from those imposed for gross misdemeanors to those imposed for first degree felonies. Not only is this range of punishment broader than that found under the present law,[481] but the strictest sanction is more severe than that found under most modern penal codes.[482]

An apparent inconsistency in sanctions stems from the Code's distinction between "dwelling" and "building."[483] If a person burns or explodes an isolated *dwelling* which he knows is unoccupied, he is guilty of first degree arson; yet if he intentionally burns or explodes a building which is not ordinarily occupied but which, unknown to the actor, in fact is occupied at that time by a person who is killed in the burning or explosion, the actor is guilty of second degree arson, and is subject to a lesser penalty. This apparent incongruity is resolved, however, since the actor may be found guilty of first degree murder whenever a person is killed in the perpetration of arson in any degree.[484]

480. There are two affirmative defenses to first degree arson. If the building damaged ordinarily is occupied, it is an affirmative defense that no person other than a participant in the crime was present in the building when it was burned or exploded and that the actor knew of such a condition. If the damaged building is an unoccupied dwelling it is an affirmative defense that no other person had a possessory or pecuniary interest in the dwelling or that those who had such an interest gave their permission, and that the actor's intention was to destroy the building for a lawful purpose. R.W.C.C. § 9A.48.010(2), (3). The affirmative defense to second degree arson is similar to the latter of the two defenses to first degree arson, except that it applies to a fire or explosion that damages any of the property involved in second degree arson and not to dwellings alone. R.W.C.C. § 9A.48.020(2). The third degree offense has as an affirmative defense proof that no person other than the actor had an ownership interest in the building. R.W.C.C. § 9A.48.030(2).

481. Compare notes 473 and 475 and accompanying text *supra*, with notes 472, 474 and 479 and accompanying text *supra*.

482. *See, e.g.*, M.P.C. § 220.1; N.Y. PENAL LAW § 150.15 (McKinney 1967); and STAFF OF JOINT LEGISLATIVE COMM. FOR THE REVISION OF THE PENAL CODE, STATE OF CALIFORNIA, THE CRIMINAL CODE § 1072 (1971). All of these punish their highest degree of arson as a second degree felony. *But see* MICH. REV. CRIM. CODE § 2805 (Final Draft 1967) and ORE. LAWS ch. 743, § 144 (1971), which grade their highest degree of arson as a first degree felony.

483. *See* notes 471-472 *supra*. The Code defines a "dwelling" as a building which is used as a home or place of lodging, R.W.C.C. § 9A.04.130(8), while a "building" (in addition to its ordinary meaning) refers to any structure used for overnight lodging or business purposes. R.W.C.C. § 9A.48.005(1).

484. Prosecution in this situation could probably be brought under R.W.C.C. § 9A.32.020(1)(b)—where "under circumstances manifesting an extreme indifference to human life, [the actor] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person . . . ." Whether the

Finally, in a few respects the Code has failed to accomplish its manifest objectives in dealing with fire-related crimes. The unequal treatment afforded hay burners and warf burners defeats one of the Code's goals by unreasonably differentiating between similar crimes.[485] Further, although both arson in the third degree[486] and reckless burning[487] require an intentional burning or explosion, the actor who actually damages a building by his reckless conduct is punished as a third degree felon, while the actor whose reckless conduct fortuitously does no damage is punished only as a gross misdemeanant. Not only can the third degree felon be punished five times more severely than the gross misdemeanant, but he must also bear the felon's social, economic, and political stigma. To make the severity of the punishment turn on the fortuity of the result is to contradict the Code's purpose of differentiating upon reasonable grounds and deterring unlawful and dangerous conduct.[488]

XI. BURGLARY

The burglary chapter of the Proposed Code comprehensively deals with all knowing and unlawful entry upon or failure to leave the property of another.[489] The chapter describes not only the crime of burglary but also the offense of criminal trespass. Following the Michigan plan,[490] the burglary chapter of the Proposed Code establishes three degrees of burglary[491] and three degrees of criminal trespass, thus combining all of the present disjointed law within one chapter and

actor could also be convicted under R.W.C.C. § 9A.32.020(1)(c)—a killing in the course of a forcible felony—depends on clarification of the Code's term "forcible felony," *i.e.*, whether the Code's definition of the crime or the actual result of the actor's conduct controls. For a discussion of this problem, see the sections on assault and homicide in this comment.

485. The objectives of the Code are to deter unlawful and dangerous conduct, to safeguard conduct which is without culpability from being condemned as criminal, to give fair warning of the nature of the conduct declared to constitute an offense, and to differentiate between more serious and more minor crimes on reasonable grounds while preserving proportionate penalties for each. R.W.C.C. § 9A.04.020(1).

486. *See* note 479 and accompanying text *supra*.

487. *See* note 467 *supra*.

488. *See* note 485 *supra*.

489. R.W.C.C. ch. 9A.52.

490. MICH. REV. CRIM. CODE §§ 2601-2615 (Final Draft 1967).

491. The present Washington burglary law divides the crime into two degrees. *See* WASH. REV. CODE §§ 9.19.010, .020 (1959).

affording greater precision and flexibility to the definition and enforcement of the law.

Under the Code, the crime of burglary has three requisite elements. An actor must (1) knowingly enter or remain unlawfully (2) in a building (3) with the intent to commit a crime against a person or property therein. The "enter or remain unlawfully" concept emphasizes that which is essential to burglary, an intrusion upon premises without license or privilege, thereby assuring continuation of the historical protection of property. At the same time, the Code modernizes the law by eliminating two superfluous vestiges of the common law, the prerequisite of breaking and entering,[492] and the requirement that the crime be perpetrated during the nighttime.[493] Burglary, under the Code, remains an inchoate crime to the extent that the actor need only *intend* to commit a crime against a person or property after having entered or remained unlawfully in a building. As a result the Code's treatment of the crime of burglary is both archaic and modern. By retaining as the inchoate crime of burglary what in reality is a hybrid of criminal trespass and attempt, the Code reflects the common law's inability to define and distinguish between conduct punishable as criminal trespass and conduct punishable as attempt.[494] However, within these inarticulate parameters, the Code successfully streamlines the crime of burglary by proscribing rather restricted conduct.

First degree burglary[495] exists under the Code if the actor, armed

492. *See* PERKINS at 192-200. Note also that "breaking" may be an element of both first and second degree burglary under the present law. WASH. REV. CODE §§ 9.19.010, .020 (1959).

493. WASH. REV. CODE § 9.19.010 (1959). Following the common law, Washington's present burglary statute provides that first degree burglary can only be committed during the nighttime. Evidently the drafters of the Code felt that daytime and nighttime burglaries created similar risks while equally terrorizing the inhabitants of the burglarized premises.

494. The Model Code intimates that the elimination of the crime of burglary would probably be the best solution:

> If we were writing on a clean slate, the best solution might be to eliminate burglary as a distinct offense. . . . But we are not writing on a clean slate. Centuries of history and a deeply embedded Anglo-American conception like burglary cannot easily be discarded. The needed reform must therefore take the direction of narrowing the offense to something like the distinctive situation for which it was originally devised: invasion of premises under circumstances specially likely to terrorize occupants.

M.P.C. § 22.1, Comment at 57 (Tent. Draft No. 11, 1960). The proposed Michigan code refers approvingly to this passage in its commentary on burglary offenses. MICH. REV. CRIM. CODE §§ 2610-2612, Comment at 200 (Final Draft 1967).

495. R.W.C.C. § 9A.52.010. Under the present law, first degree burglary is punishable by not less than five years in the state penitentiary. WASH. REV. CODE § 9.19.010

with a deadly weapon, enters or remains unlawfully in a "dwelling"[496] with the intent to commit a crime against a person or peoperty therein. The Code narrows the present first degree offense by requiring that the actor's intent be to commit a crime against a person or property within the entered dwelling, rather than merely to commit "some crime therein" as under the current statute.[497] This provision prevents the commission of a minor regulatory crime from escalating what would otherwise be criminal trespass to the more serious offense of burglary.[498] In addition, the Code alters the present law by eliminating aggravation of the crime when physical injury is inflicted upon a person within the entered structure. Since the intentional or reckless infliction of serious injury constitutes first degree assault,[499] there is no reason to consider the same circumstances in grading burglary.

Second degree burglary under the Code requires either one of the two first degree conditions—that the building burglarized be a dwelling, *or* that the actor be armed with a deadly weapon.[500] Burglary's three requisite elements alone constitute the third degree offense.[501] These two degrees of burglary fairly well divide the present second degree burglary offense,[502] penalizing the separate elements of the existing crime in proportion to the risk created by the conduct involved. Entering a dwelling house of another, the most dangerous and terrorizing aspect of present second degree burglary, is retained as a determinant of second degree burglary; it is punished more severely under the Code than is entering a building, room, or other structure in which any property is kept, an element which creates less risk and consequently receives a lesser sanction as third degree burglary under the

(1959). The Code punishes first degree burglary as a first degree felony, *i.e.*, by imprisonment in the state penitentiary for not less than twenty years and/or a fine of not more than $10,000. R.W.C.C. § 9A.20.020(1)(a). Other model penal codes do not punish burglary so severely. *See, e.g.*, N.Y. PENAL LAW §§ 140.20-.30 (McKinney 1967). Evidently the drafters of the Code felt that the magnitude of the risk created to human life when an actor enters a dwelling armed with a deadly weapon warrants the highest degree of punishment.

496. A "dwelling" is defined as any building "used or ordinarily used by a person for lodging." R.W.C.C. § 9A.52.005(2). A "building" is defined to include "any structure, vehicle, railway car, aircraft, or watercraft used for lodging of persons or for carrying on business therein." R.W.C.C. § 9A.52.005(1).

497. WASH. REV. CODE § 9.19.010 (1959).

498. Under the Code all degrees of burglary are felonies and require that the actor intend to commit a crime against a person or property. R.W.C.C. §§ 9A.52.010-.030.

499. R.W.C.C. § 9A.36.010.

500. R.W.C.C. § 9A.52.020.

501. R.W.C.C. § 9A.52.030.

502. WASH. REV. CODE § 9.19.020 (1959).

Code.[503] Thus the Code succeeds in better defining appropriate sanctions for criminal conduct.

In prosecutions for first and second degree burglary under the Code, there is a presumption that any person who knowingly enters or remains unlawfully in a dwelling shall be deemed to have intended to commit a crime against a person or property therein.[504] The present law has a similar provision.[505] Also, under the Code an actor may not be sentenced for both the crime he intended to commit and burglary, even though he may be prosecuted for both.[506] The present draft of the Code contains no crime concerning the possession of burglar tools; however, the comments to the Code indicate that a section will be drafted dealing with this crime.[507]

The Code is flawed by its inconsistent punishment of similar criminal intents and of equivalent risk creation. The actor who commits an armed burglary in an occupied building with the intent to commit a crime against a person or property therein creates as great a risk as the armed burglar who enters a dwelling with the same intent.[508] Yet

503. The Code's allocation of punishment for second and third degree burglary seems more appropriate than the present law's punishment of the two different elements with the same sanction. The present law punishes all conduct constituting second degree burglary by imprisonment in the state penitentiary for a maximum of fifteen years. WASH. REV. CODE § 9.19.020 (1959). The Code classifies second degree burglary as a second degree felony (R.W.C.C. § 9A.52.020(2)), which is punishable by not more than ten years in the state penitentiary and/or not more than a $10,000 fine. R.W.C.C. § 9A.20.020(1)(b). Third degree burglary is a third degree felony under the Code (R.W.C.C. § 9A.52.030), punished by imprisonment in the state penitentiary for not more than five years and/or not more than a $5,000 fine. R.W.C.C. § 9A.20.020(1)(c).

504. R.W.C.C. § 9A.52.025.

505. WASH. REV. CODE § 9.19.030 (1959). However, the Proposed Code restricts the times when this presumption can be applied. Under the Code, the person must have *knowingly* entered or remained unlawfully in a *dwelling* (R.W.C.C. § 9A.52.025), while the present law requires only unlawful entry or unlawful breaking and entering a building or structure. Under both the present law and the Code, this presumption can be overcome by an explanation to the jury that such entry was made without criminal intent.

506. R.W.C.C. § 9A.52.035. The present law allows punishment for both the crime committed and burglary. WASH. REV. CODE § 9.19.040 (1959). The comments to the Code at p. 217 state the reason for this change as follows:

> . . . no useful social purpose is furthered by allowing cumulative sentences for relatively minor offenses to be added to a felony prosecution for burglary, whereas if the sentence for the "extra" crime is greater than for the burglary no point is served by sentencing for both.

507. R.W.C.C. ch. 9A.52, Comment at 213. Under the present law, possession of burglar tools is prima facie evidence of intent to use such in the commission of crime, and simply making, mending or possessing such tools is a gross misdemeanor. WASH. REV. CODE § 9.19.050 (1959).

508. However, it could be argued that the armed burglar creates a greater risk in a dwelling than in a building, because the occupant is more likely to respond in-

the former is guilty of second degree burglary while the latter may be convicted of first degree burglary. The resulting disparate sanctions perhaps can be justified by the presumption that a person burglarizing a building has more control over the risk he creates than does the burglar of a dwelling; however, such a presumption does not seem warranted when one considers that the armed burglar of a crowded country club creates a greater risk to human life than does the armed burglar of a dwelling which the actor knows is unoccupied.

Criminal trespass differs from burglary in that the entry or failure to leave need not be accompanied by an intent to commit a crime, nor need the entry be into a building. The underlying concept of the entire burglary chapter—knowingly entering or remaining unlawfully—is basic to criminal trespass.[509] The severity of the cime is determined by the type of property trespassed upon. If the property is a dwelling, the crime is first degree criminal trespass,[510] punishable as a gross misdemeanor;[511] if it is a building, or real property which is fenced or otherwise enclosed in a manner designed to exclude intruders, it is second degree criminal trespass,[512] punishable as a misdemeanor;[513] if the property is merely the premises of another, it is third degree criminal trespass[514] and is a violation.[515] The Code lists three affirmative defenses to the crime of criminal trespass,[516] the most useful of which is abandonment of the building or dwelling.

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stinctively with counter-force to protect his home and family than to defend himself in another building. This distinction is recognized in the justification section of the Proposed Code, which imposes no obligation to retreat from one's dwelling or place of work. R.W.C.C. § 9A.16.040(3)(c)(i). *See* the section on justification in this comment.

509. R.W.C.C. §§ 9A.52.040-.060.

510. R.W.C.C. § 9A.52.040.

511. A gross misdemeanor is punished by imprisonment in the county jail for not more than one year and/or a fine of not more than $1,000. R.W.C.C. § 9A.20.020(2).

512. R.W.C.C. § 9A.52.050.

513. Under the Code a misdemeanor is punished by imprisonment in the county jail for not more than ninety days and/or a fine of not more than $500. R.W.C.C. § 9A.20.020(3).

514. R.W.C.C. § 9A.52.060.

515. Under the Code a violation may be punished only by a fine of not more than $500. R.W.C.C. § 9A.20.020(4).

516. R.W.C.C. § 9A.52.065 provides the following affirmative defenses to criminal trespass: (1) the building or dwelling was abandoned; (2) the premises were at the time open to the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or (3) the actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, *would have* licensed him to enter or remain.

The third affirmative defense differs from a mistake of fact defense under R.W.C.C. § 9A.08.040(1)(a) (negating the mental state of knowledge which is an element of criminal

XII. THEFT AND ROBBERY

A. Theft

Consolidation of the theft-related offenses of larceny, false pretenses, and embezzlement into the single crime of theft is the Proposed Code's chief innovation in the theft section.[517] The current Washington larceny statute merely lists these common law theft offenses,[518] thus retaining the substantive distinctions that plagued the common law.[519] The crux of the new theft offense is the single social evil of obtaining control over the property of another with intent to divert it to the actor's own purposes.[520] By focusing on one central element, the Proposed Code eliminates many of the technical complexities of the common law and facilitates the more efficient administration of justice.

The theft sections of the Proposed Code consolidate only larceny, embezzlement, and false pretenses,[521] treating other related offenses as separate crimes.[522] At first glance, this separation of offenses might

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trespass) in requiring proof that the actor's belief was *reasonable*, a condition not imposed by the mistake of fact provision.

All affirmative defenses operate to shift the burden of proof to the prosecution once the defendant offers some evidence supporting the affirmative defense. R.W.C.C. § 9A.04.120.

517. R.W.C.C. § 9A.56.010-.040.

518. WASH. REV. CODE § 9.54.010 (1959). The five common law offenses collected in the current Washington statute as subcategories of larceny include: (1) the typical trespassory taking, (2) taking by false pretenses, (3) taking by embezzlement, (4) appropriating property received by mistake, and (5) receiving stolen property.

519. For a case so stating, see State v. Thompson, 68 Wn.2d 536, 413 P.2d 951 (1966). As anyone familiar with the common law offenses knows, the distinctions between the offenses are many and perplexing. For example, if a fiduciary lawfully receives property of the owner and subsequently forms the intent to misappropriate it, he is guilty of embezzlement. If the same fiduciary receives property of the owner with intent at that time to misappropriate it, he is not guilty of embezzlement, but rather larceny. Thus the rather important distinction between larceny and embezzlement turns on the ephemeral criterion of when the intent was formed. For more examples of the perplexing distinctions, *see* PERKINS at 247-48.

520. R.W.C.C. § 9A.56.010.

521. Most revised codes contain a similar consolidation in the area of theft, *see, e.g.*, MICH. REV. CRIM. CODE § 3205 (Final Draft 1967). However, the Model Penal Code provides for consolidation of the additional theft-related offenses of extortion, blackmail, fraudulent conversion, receiving stolen property, appropriation of lost or misdelivered property, theft of services and unauthorized use of a vehicle under the simple theft heading. *See* M.P.C. §§ 223.1-.9.

522. Thus appropriation of lost or misdelivered property, R.W.C.C. § 9A.56.050; theft of services, R.W.C.C. § 9A.56.060; unauthorized use of a vehicle, R.W.C.C. § 9A.56.070; extortion, R.W.C.C. §§ 9A.56.090-.110; receiving stolen property, R.W.C.C. §§ 9A.56.120-.150; obscuring the identity of a machine, R.W.C.C. § 9A.56.155; and robbery, R.W.C.C. § 9A.56.160, are separate crimes under the Code.

seem to reinstate the problems created by pre-consolidation law. But the technical distinctions which infused common law theft crimes were most prevalent in larceny, false pretenses, and embezzlement offenses,[523] and the drafters obviously believed that each of the other offenses was sufficiently distinct to justify separation.

Examination of the crimes not included in the theft provision of the Proposed Code largely validates the drafters' decision to treat them separately. For example, appropriation of lost or misdelivered property and unauthorized use of a vehicle are distinguished from theft because they are clearly less culpable offenses than the theft crimes.[524] Robbery and extortion are also not consolidated in the theft provision because these crimes stress the accompanying elements of force or threat rather than the underlying theft.[525]

However, two offenses which are treated separately, recovery of stolen property and theft of services, might seem appropriate for inclusion in the consolidated theft offenses. Receiving stolen property differs from the theft offenses because it proscribes conduct that takes place after the initial theft—"retaining" and "disposing" of the property. But if "receiving" is not consolidated under theft, then if there is a doubt about whether the possessor of the stolen item is a thief or a receiver, an allegation charging one may fail if the other is actually proven.[526] This problem can easily be avoided, however, by alternatively alleging theft or receiving.[527]

Theft of services differs from the consolidated theft offenses only in the subject matter of the theft (services instead of goods). Thus it may be appropriate to consolidate this offense with the other theft of-

523. *See* note 519 *supra*.

524. In appropriation of lost or misdelivered property, the culpability is reduced because the planning stage is not present. R.W.C.C. § 9A.56.050. Unauthorized use of a vehicle is less culpable than theft because the actor must only know that the vehicle is stolen; there is no requirement that he intend to deprive the owner of the vehicle permanently. R.W.C.C. § 9A.56.070(1). For a discussion of these two offenses, see text accompanying notes 536 and 545 *infra*.

525. Thus extortion and robbery are graded according to the seriousness of the aggravating circumstances rather than the amount of money involved in the theft offenses. R.W.C.C. §§ 9A.56.100, .170. For a discussion of these offenses, see text accompanying notes 548 and 566 *infra*.

526. *See* M.P.C. § 206.8, Comment (Tent. Draft No. 2, 1954).

527. Arguably an allegation of "receiving" may be sufficient to allege both offenses, because "receiving" is broadly defined as "intentionally to receive, retain, or dispose of stolen property knowing that it has been stolen." R.W.C.C. § 9A.56.120(1).

fenses.[528] However, since tangible goods are not involved, this offense is clearly distinguishable from the consolidated theft offenses.[529]

Thus, except for the possible qualifications above mentioned, the Proposed Code's consolidation-separation scheme seems quite appropriate.

The other major change in the proposed theft statute involves grading. Currently, the penalty structure is divided into two categories —grand larceny and petit larceny.[530] The Code proposes a three-level penalty structure, with the degree of penalty depending on both the amount stolen and other factors.[531] If over $1,500 is stolen, or the theft is from the person of the victim, the crime is first degree theft and is punished as a second degree felony. This replaces the rather paltry $75 minimum under the present law, and substitutes a maximum penalty of ten years' imprisonment and a $10,000 fine for the current maximum of fifteen years. This change reflects the drafters' recognition that inflation compels a corresponding redefinition of theft.

If property worth between $250 and $1,500 is stolen, the crime is second degree theft, which is a third degree felony imposing a maximum penalty of five years' imprisonment and a $5,000 fine. This second degree provision also includes theft of credit cards, the inclusion of which seems warranted to deter the widespread misuse of credit cards in theft schemes.[532]

For amounts less than $250, the crime is third degree theft, punish-

528. The present definition of property does not include services. R.W.C.C. § 9A.56.005(7). If the offenses were consolidated this definition would have to be expanded.

529. As noted previously, the consolidated common law theft offenses—larceny, embezzlement, and false pretenses—are difficult to distinguish and are plagued with technicalities. *See* note 519 *supra*.

530. WASH. REV. CODE § 9.54.090 (1959). Grand larceny includes:
(1) Theft from the person of the victim,
(2) Theft from a building on fire,
(3) Theft of public records,
(4) Theft of a horse or other animal from a pasture,
(5) Theft of over $25 by means of a bad check,
(6) Theft of over $75.
Every other theft is petit larceny. The Proposed Code provides no special treatment for theft from a building on fire, theft of an animal from pasture, nor theft of $25 or over by means of a bad check. These changes are in keeping with the thought that the method (except for forceful takings) of wrongfully obtaining property is not as significant as the amount wrongfully obtained.

531. R.W.C.C. §§ 9A.56.020-.040.

532. *See* Annot., 24 A.L.R.3d 986 (1969).

able as a gross misdemeanor. The penalty for a gross misdemeanor is the same as that now imposed for petit larceny.[533]

The final change in the theft section is one of language with little prospective substantive impact. The present larceny statute requires only an intent to deprive the owner of his property, while the proposed section requires an "intent permanently to deprive" another of his property.[534] However, the phrase "permanently to deprive" is defined to include those instances where the deprivation might not actually be permanent but would nevertheless result in the loss of a major portion of the economic value of the property.[535] Thus the requirement that an intent permanently to deprive be shown precludes theft prosecution for mere unauthorized use, but still includes those instances where such use results in significant economic loss to the owner.

B. Appropriation of Lost or Misdelivered Property

Appropriation of lost or stolen property is considered a less culpable offense than the other theft offenses, and for this reason is treated in a separate section.[536]

A significant inclusion in this section is the coverage of one who knowingly steals "lost"property. This behavior is clearly as deserving of punishment as is theft of misdelivered property,[537] but current Washington law does not explicitly proscribe such conduct.[538] The new provision closes the gap in the statutory provisions, and makes it

533. The maximum penalty for a gross misdemeanor is one year's imprisonment and a $1,000 fine. R.W.C.C. § 9A.20.020(2). Most other codes also structure the penalty for theft in a multidivision fashion. Each code varies in the circumstances that gauge the relative seriousness of the penalty. The divergence is difficult to judge, but in general, the system suggested by the Proposed Code seems appropriate. *See* MICH. REV. CRIM. CODE §§ 3206-3208 (Final Draft 1967); M.P.C. § 223.1(2); N.Y. PENAL LAW §§155.25-.40 (McKinney 1967).

534. R.W.C.C. § 9A.56.010.

535. R.W.C.C. § 9A.56.005(3).

536. R.W.C.C. § 9A.56.050.

537. WASH. REV. CODE § 9.54.010(4) (1959) prohibits appropriation of misdelivered property, but there is no statutory provision covering appropriation of lost property.

538. No Washington cases have decided the issue, but the offense was covered at common law in cases in which the finder had a clue as to the ownership. *See* PERKINS at 251. The new Code is even more stringent since it seems to require notice to a police officer whether or not there is a clue to ownership.

clear that to avoid criminal liability, the finder must take positive steps to return the property to its owner.[539]

The other change is one of penalty. Because appropriation of lost or misdelivered goods is considered a less culpable offense than other types of theft, it deserves a lesser penalty. Consequently, instead of the fifteen year maximum specified under the current statute, the Proposed Code reduces the maximum term of imprisonment to one year, classifying this conduct as a gross misdemeanor if the amount stolen exceeds $250; as a misdemeanor if the amount is between $50 and $250; and as a violation if the property does not exceed $50 in value.[540]

C. Theft of Services

The theft of services provision[541] prohibits the obtaining of services with intent to avoid payment. Under the current law, this conduct is punishable under a motley assortment of separate statutes.[542]

Although the definition of services in the new Code lists several types of activities to which it applies, the drafters clearly indicated their intent to apply the new offense to all types of services.[543]

Finally, the Proposed Code eliminates the presumption of guilt for persons absconding from the premises without paying.[544] The former presumption is inconsistent with the Code's general principle that the state has the burden of proving the basic criminal elements.

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539. The positive action includes, but is not necessarily limited to, notifying the police. R.W.C.C. § 9A.56.050(2).

540. R.W.C.C.§ 9A.56.050(3). Thus the maximum penalty for commission of this offense is one year in the county jail and/or a fine of not more than $1,000. R.W.C.C. § 9A.20.020(2). This three-fold distinction is consistent with the Code's perspective on money value (inflation) and the relative impact on society of criminal conduct.

541. R.W.C.C. § 9A.56.060.

542. *See, e.g.*, WASH. REV. CODE § 9.45.040 (1959) (obtaining accommodations by fraud). There is no general statute covering theft of services, because the word "property" as defined for theft does not include "services."

543. R.W.C.C. § 9A.56.005(9). The definition of services is expressly not limited to the types of activities listed. This provision is in substantial accord with the Model Penal Code, M.P.C. § 223.7, but differs from the New York code which includes only specified types of services. N.Y. PENAL LAW § 165.15 (McKinney 1967). The reason that the New York code limits the types of services subject to the theft provision is that otherwise "legislation would doubtless lead to hosts of criminal charges of a basically civil nature." *Id.*, Practice Commentary, at 506. This fear probably stems from the semblance of these service crimes to civil debts, but if the thief obtains the service and at the same time intends to avoid payment, the action can rightly be said to be criminal in nature.

544. WASH. REV. CODE § 19.48.110 (1959).

D. *Unauthorized Use of a Vehicle*

The crime of unauthorized use of a vehicle is broadened somewhat under the Proposed Code. The definition of vehicle has been expanded beyond "automobile" to include aircraft and all machines powered mechanically and by sail.[545] The only other change is one of grading. Instead of the current felony classifications, the new Code grades this offense as a gross misdemeanor.[546] The lesser penalty seems appropriate due to the lesser intent required for this crime, *i.e.*, there need be no intent to permanently deprive the owner of his property. However, if the actor recklessly or with criminal negligence destroys or substantially damages the vehicle, the crime then becomes a third degree felony. The drafters seem inconsistent in hinging the higher penalty on the fortuity of whether the vehicle is destroyed or damaged. The behavior the law seeks to deter is unauthorized use, because such use creates a risk of both physical and economic injury. These risks are the same regardless of whether the vehicle is actually destroyed or damaged. If the risk of damage merits more severe sanction, then the whole penalty should be increased. Actual destruction is a separate offense, properly punishable elsewhere.[547]

E. *Extortion*

The proposed extortion provision is very similar to the current Washington law. The basic element, gaining property by threat, is unchanged. However, the Proposed Code simplifies the law so that only intentional acquisition of another's property is covered.[548] In contrast, the existing extortion law also proscribes compelling another to "make or destroy . . . any writing intended to affect any cause of action or defense."[549] The current extortion statute also includes obtaining

545. R.W.C.C. § 9A.56.005(13), referring for the definition of "vehicle" to § 9A.04.130(26).

546. R.W.C.C. § 9A.56.070(2). The maximum penalty for a gross misdemeanor under the Code is one year imprisonment and a $1,000 fine. R.W.C.C. § 9A.20.020. The existing statute imposes a penalty of ten years' imprisonment. WASH. REV. CODE §§ 9.54.020, 9.92.010 (1959).

547. *See, e.g.*, R.W.C.C. § 9A.48.080, reckless endangerment of property.

548. R.W.C.C. § 9A.56.090.

549. WASH. REV. CODE § 9.33.010 (1959). To the extent that compelling anyone to make an instrument transfers property, the offense is covered by the new Code. However, compelling another to make an instrument that does not result in transfer of prop-

property "by means of force," while the Code separates extortion from robbery by defining extortion as a threat of bodily injury in the future, and robbery as a threat of immediate injury.

The Proposed Code simplifies extortion and other related offenses by eliminating the redundant current blackmail provision[550] and by shifting the current offense of extortion by a public officer[551] into the bribery and corrupt influences section of the Code.[552] The main change in the extortion provision is, as in other theft offenses, a grading change. The current extortion statute lists five types of threats which are penalized identically.[553] The Code substantially expands this list and makes the penalty dependent on the nature of the threat.[554] If the threat is one of physical violence against persons or property, it constitutes extortion in the first degree, a second degree felony. All other types of threats constitute second degree extortion, punishable as third degree felonies. The expanded list is very inclusive, as it should be, for the objective of an extortion statute is to penalize all acquisition of property by threat. If a particular kind of threat creates sufficient fear in the victim to cause him to give up his property, the action should be an offense.

It is arguable that the proposed section is overly broad in one respect. Included in the list of threats constituting second degree extortion is the threat "to do any . . . act which is intended to harm substan-

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erty or compelling another to destroy an instrument are not, and should not be included under extortion. Rather, such non-theft offenses come more appropriately under the offense of coercion, R.W.C.C. § 9A.36.070.

550. WASH. REV. CODE § 9.33.050(1959).

551. WASH. REV. CODE § 9.33.040 (1959).

552. R.W.C.C. ch. 9A.68.

553. WASH. REV. CODE § 9.33.010 (1959) lists these five threats:
(1) To accuse anyone of a crime,
(2) To do any injury to any person or to any property,
(3) To publish or to connive at publishing any libel,
(4) To expose or impute to any person any deformity or disgrace,
(5) To expose any secret.
The current penalty for extortion is not more than five years in the state penitentiary.

554. In addition to the threats listed under the current extortion statute, *see* note 553 *supra*, the proposed provision, R.W.C.C. § 9A.56.005(11), includes the following threats: (c) to subject the person threatened or any other person to physical confinement or restraint; (g) to testify or provide information or withhold testimony or information with respect to another's legal claim or defense; (h) to take wrongful action as an official; (i) to bring about or continue a strike, boycott or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; (j) to do any act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition or personal relationship.)

tially the person threatened with respect to his . . . business (or) financial condition."[555] As drafted, it is arguable that this section could be applied inappropriately to instances of normal economic bargaining. Other codes have qualified this provision by requiring that the action be without benefit to the actor,[556] thereby limiting its application to those instances where the harm threatened is purely gratuitous.

F. Receiving Stolen Property

The offense of receiving stolen property, currently included under Washington's broad larceny statute,[557] constitutes a separate offense under the Code.[558] However, the basic elements of the crime (intentionally receiving, retaining or disposing of property knowing that it has been stolen) have not been changed.[559] The Proposed Code specifically includes the affirmative defense that the stolen property was received with the intent to restore it to the owner. There is no similar provision in the present statute, but the defense has been recognized in case law.[560] The Code also makes it clear that identification of the original thief is not a prerequisite to a prosecution for receipt of stolen property. While no case has been found directly on this point, the principle is obviously implied in cases of "receiving" in which there has been no conviction for the theft.

The Proposed Code grades the offense of "receiving" differently from the current law. Instead of the rigid larceny penalty, the Code

555. *See* note 554 *supra*.

556. *See* M.P.C. § 223.4(g) and MICH. REV. CRIM. CODE § 3201(xi) (Final Draft 1967).

557. WASH. REV. CODE § 9.54.010(5) (1959).

558. R.W.C.C. § 9A.56.120. The Proposed Code makes unnecessary the "aid in concealing or withholding" section. Insofar as the thief's actual conduct is concerned, concealment adds nothing because the conduct is obviously covered by the specification "retain"; insofar as others (not the thief or the receivers) aid in concealing, their conduct would seem to be included under the accessorial sections of the Proposed Code. *See, e.g.,* R.W.C.C. § 9A.08.060; ch. 9A.76.

559. The language of the Proposed Code (receive, retain, dispose) seems a clearer statement (and possibly broader) than "buy, sell, receive or aid in concealing or withholding" as specified under the current section.

560. State v. Martin, 94 Wash. 313, 162 P. 356 (1917). It should be noted that intent to restore is not a valid defense to embezzlement, State v. Larson, 123 Wash. 21, 211 P. 885 (1923); nor to larceny, State v. Black, 163 Wash. 237, 1 P.2d 206 (1931); nor to false pretenses, State v. Adams, 144 Wash. 363, 258 P. 23 (1927). The obvious reason for this is that these crimes are complete on the taking and an intent to restore does not change the fact that the victim is harmed by the deprivation of the property, even if it be only temporarily.

imposes a three-fold penalty identical to that used in the theft sections.[561]

G. Obscuring Identity of a Machine

The Proposed Code makes it a gross misdemeanor to obscure the distinguishing marks (serial numbers) of a vehicle with intent to render it unidentifiable, or knowingly to possess such an obscured vehicle for resale.[562] The current law comes very close to imposing absolute liability on persons innocently possessing an obscured vehicle.[563] The Code attempts to rectify this situation by removing the present provision making mere possession prima facie evidence of guilt, by limiting the prosecution to those who actually obscure the numbers or persons holding machines for resale, and by allowing avoidance of prosecution by informing the proper authorities of the obscuring.

By limiting the prosecution to sellers in the course of business,[564] the Proposed Code appears to go too far.[565] Such a limitation means that one who purchases a machine for his personal use with actual knowledge that the serial number has been altered will not be subject to prosecution, while one who possesses a machine for resale with similar knowledge would be punishable under the Code. It is difficult to justify this result in terms of the actor's culpability. Elimination of this limitation would have no detrimental effects, because innocent purchasers are protected by the Code's requirement of knowledge, and those who innocently received the vehicle but later acquired knowledge of the alteration could be exculpated under the Code by notifying the proper authorities.

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561. R.W.C.C. §§ 9A.56.130-.150.
562. R.W.C.C. § 9A.56.155.
563. WASH. REV. CODE §§ 9.54.030,-.040 (1959).
564. R.W.C.C. § 9A.56.155(1)(b).
565. The Code punishes one who "possesses a vehicle or machine held for sale in the course of business knowing that the serial number or other identification number or mark has been obscured." R.W.C.C. § 9A.56.155(1)(b). Since "machine" is defined as any machinery or device held for sale in the course of business," it is most likely (in terms of both grammar and equity) that the quoted reference in R.W.C.C. § 9A.56.155(1)(b) constitutes a redundant statement of the Code's definition of machine, which is not intended to modify the phrase "possesses a vehicle." If this is the correct construction, knowing possession of an obscured vehicle would be punishable under the Code. This ambiguity should be clarified by deleting the words "held for sale in the course of business" to achieve the most logical and equitable result.

H. Robbery

The robbery provision of the Proposed Code is basically similar to the present law in proscribing the use or threat of immediate force in the course of committing or attempting to commit a theft.[566] However, the new Code does slightly change the definition and scope of the current robbery provision[567] and substantially changes its grading.

First, instead of defining robbery to encompass threats of immediate or future injury,[568] the Code includes only threats of immediate injury.[569] Second, unlike the present law, the Code does not require that the taking be in the presence of the victim.[570] This change probably is insignificant since the taking usually occurs in the presence of the victim anyway.[571] Whereas the present law emphasizes the property aspect of robbery by requiring that property actually be taken from the victim, the Proposed Code deems the attack rather than the theft to be of prime import, and therefore defines robbery to include all phases of the act from the attempt to rob through the flight therefrom.[572]

The other major change is in the penalty structure. The proposed section eliminates the rather harsh and inflexible mandatory minimum five year sentence imposed under current law and establishes two degrees of robbery.[573] Robbery in the first degree is established if in the course of committing the robbery or in immediate flight therefrom the actor is armed with a deadly weapon. However, if the robber can show that the weapon with which he was armed was unloaded, then the robbery is treated as one of second degree. Robbery in the first

566. R.W.C.C. § 9A.56.160.

567. The Code eliminates the separate offenses of interfering with a railroad with intent to commit robbery, WASH. REV. CODE § 9.75.020 (1959), and robbing sluice boxes, WASH. REV. CODE § 9.75.030 (1959).

568. The present statute has been so interpreted. State v. Casto, 120 Wash. 557, 207 P. 952 (1922).

569. R.W.C.C. § 9A.56.160. Threat of future injury is included in the extortion section of the Proposed Code. R.W.C.C. § 9A.56.090.

570. WASH. REV. CODE § 9.75.010 (1959).

571. However, to the extent that there would be cases in which a threat of use of immediate force could be made against a victim not in his presence, (*e.g.*, a threat to shoot the victim in order to force him to telephone directions for the dispositions of property located elsewhere), such cases are subject to the same increased risks as where the taking is in the actual presence of the victim and thus should be included as robbery.

572. R.W.C.C. § 9A.56.170(1).

573. *Compare* WASH. REV. CODE § 9.75.010 (1959) *with* R.W.C.C. §§ 9A.56.170-.190.

degree is a first degree felony. All other robberies are second degree felonies.[574]

XIII. FRAUD

In the area of fraud, the Proposed Code makes no significant changes in the current law. Primary emphasis has been placed on clarification of the law,[575] with some adjustment being made in grading. The current grading of forgery involves consideration of a maze of complex factors.[576] The Proposed Code substitutes a structure based primarily on consideration of two crucial factors: (1) the need for guaranteeing to the public the authenticity of instruments and records on which the community is accustomed to rely, and (2) the ease with which a particular activity might result in a large scale fraud.

The Proposed Code establishes a three-fold penalty based on the above factors. First degree forgery consists of forging: (a) part of an issue of stamps, securities or other valuable instruments issued by a governmental agency, or (b) part of an issue of corporate stocks, bonds or other similar instruments. This classification seems logical because both of the above-mentioned elements are present in these situations. Second degree forgery proscribes forgery of certain public

574. It is surprising that the proposed section does not contain a provision raising the classification of the robbery where it is committed by two or more persons. The added presence of an accomplice indicates greater planning and therefore a greater likelihood that the criminals are professionals. There is also a greater chance of violence erupting, since the criminals emotionally reinforce each other. Consequently, inclusion of this factor delineating a separate degree in between the proposed first and second degree penalties would seem appropriate. *See, e.g.*, N.Y. PENAL CODE § 160.10 (McKinney 1967); MICH. REV. CRIM. CODE § 3306(1) (Final Draft 1967). Under the Code a first degree felony imposes a minimum sentence of twenty years' imprisonment or a maximum of $10,000 fine. A second degree felony imposes a maximum sentence of ten years' imprisonment and $10,000. R.W.C.C. § 9A.20.020(1)(a), (b).

575. The Code simplifies the various current related offenses. For example, falsely indicating person as corporate or public officer, WASH. REV. CODE § 9.44.070 (1959), and true-writing signed by wrongdoer's name, WASH. REV. CODE § 9.44.070 (1959), are incorporated under the broader definition to "falsely make" and to "falsely complete," R.W.C.C. § 9A.60.005(4), (5). False certificate to certain instruments, WASH. REV. CODE § 9.44.030 (1959), is more properly included under the perjury section R.W.C.C. ch. 9A.76. And misconduct in signing a petition, WASH. REV. CODE § 9.44.080, is superfluous because it is already included in sections 29.79.440-.490, and 29.82.170-.220, which cover elections and petitions.

Finally, the Code includes uttering of a forged instrument or the possession with intent to utter in its definitional section. This behavior is now penalized under WASH. REV. CODE § 9.44.060 (1959).

576. WASH. REV. CODE §§ 9.44.010, .020 (1959).

documents and commercial instruments.[577] This type of forgery is dangerous because it inhibits the free flow of commerce, but it does not lend itself to large-scale frauds and hence is relegated to a lesser penalty. Third degree forgery includes all other forgeries.

Current law authorizes that the crime of obtaining a signature by deception be punished alternatively as a five-year felony or as a gross misdemeanor. Such an alternative felony-misdemeanor penalty raises possible constitutional problems[578] which the Proposed Code eliminates by making the crime punishable only as a gross misdemeanor.

The Proposed Code defines the crime of criminal impersonation as the doing of an act with intent to defraud another by a person who has assumed a false identity.[579] This provision is much clearer than the current statute which makes false impersonation hinge on doing one of several particular acts while in disguise,[580] but it is questionable whether there is any need for this section at all. The drafters state in the comments that "the section is designed to prohibit misrepresentations of identity for fraudulent purposes before the conduct reaches the stage of attempted theft or theft."[581] Attempted theft covers acts that are done with the specific intent to steal and which are a substantial step toward the commission of the offense, and theft itself covers the completed crime. It is of doubtful wisdom to define a crime as

577. Forgery in the second degree includes forgery of:
(a) deeds, wills, codicils, contracts, assignments, commercial instruments, and credit cards;
(b) public records; and
(c) written instruments officially issued by a public office or public employee.
R.W.C.C. § 9A.60.020.

578. The case of *In re* Olsen v. Delmore, 48 Wn.2d 545, 295 P.2d 324 (1956), struck down WASH. REV. CODE § 9.41.160 as constituting an unconstitutional denial of equal protection, because it authorized prosecuting officials to use discretion in seeking different level penalties against individuals for commission of the same activity. The penalties presently prescribed for obtaining a signature by deception are subject to the same criticism.

579. R.W.C.C. § 9A.60.050.

580. WASH. REV. CODE § 9.34.010 (1959). The acts include:
(1) Marriage,
(2) Becoming bail or surety for a party,
(3) Confessing a judgment,
(4) Subscribing, verifying, etc., any written instrument,
(5) Appearing for arraignment, etc., in any criminal proceding,
(6) Doing any act that would occasion a criminal or civil penalty if engaged in by the impersonated person.

581. R.W.C.C. § 9A.60.050, Comment at 272.

imposing an actus reus requirement less stringent than that necessary in a prosecution for attempt.[582]

XIV. FAMILY OFFENSES

A. Bigamy

The Proposed Code provides that a person is guilty of bigamy "if he intentionally marries or purports to marry another person when either person has a living spouse."[583] This provision is less inclusive than the present statute under which continued cohabitation with the second spouse is a crime.[584] Thus, a bigamous marriage in another state followed by cohabitation in Washington would no longer be criminal under the Proposed Code.[585]

The Proposed Code specifies three affirmative defenses to the crime of bigamy. The first is the actor's reasonable belief that the prior spouse was dead[586] and is similar to the defense available under current law that the first spouse has been absent for five years and is believed to be dead.[587] However, the Proposed Code abandons the rather arbitrary five year limitation and instead requires that the belief in the first spouse's death be reasonable.[588] The second affirmative defense is a court's judgment terminating or annuling the prior marriage. This provision is also similar to current law,[589] except the Proposed Code adds the requirement that the actor did not know the judgment was invalid.[590] The third affirmative defense, exculpating an

582. Especially is this so when we consider the drafters' resolution of the attempt section. In that section, they substantially revamped the current law because of dissatisfaction with the fact that the current law punished as attempts deeds that were not sufficiently advanced to be considered culpable (*i.e.*, deeds that were too near the stage of mere preparation). *See* R.W.C.C. § 9A.28.010, Comment.

583. R.W.C.C § 9A.64.010.

584. WASH. REV. CODE §§ 9.15.010, .020 (1959).

585. This is not likely to happen often, but it did occur in one of Washington's few reported bigamy cases. State v. Lewis, 46 Wn.2d 438, 282 P.2d 297 (1955).

586. Specification of this reasonable mistake of fact defense overrides the normal mistake of fact defense otherwise available under R.W.C.C. § 9A.08.040(1)(a). *See* notes 109-111 and accompanying text *supra*.

587. WASH. REV. CODE § 9.15.010(1) (1959).

588. The current Washington bigamy statute does not expressly impose a mens rea requirement, and it is not clear whether a mistake of fact would be a defense. However, by inference, State v. Deloria, 129 Wash. 497, 225 P. 405 (1924), permits a reasonable mistake of fact, which would be consistent with recent authority in other jurisdictions. *See, e.g.*, People v. Vogel, 46 Cal. 2d 798, 299 P.2d 850 (1956).

589. WASH. REV. CODE § 9.15.010(2) (1959).

590. It is unclear whether the actor can successfully assert this affirmative de-

actor who reasonably believed that he was legally eligible to marry, is new to Washington law.

The penalty for bigamy under the Proposed Code is approximately the same as under present law.[591]

B. Incest

The Proposed Code defines incest as sexual intercourse with an ancestor, descendant, brother, sister, uncle, aunt, nephew, niece, or stepchild or adopted child under eighteen years of age.[592] The inclusion of incestuous intercourse between consenting adults and with stepchildren or adopted children demonstrates the dual purposes of the provision: to prevent genetic defects and to prevent the exertion of undue influence.[593] Current law covers a slightly broader class of relatives by defining incest as sexual intercourse between persons related in the fifth degree or closer by rules of civil law;[594] it does not include stepchildren, however.[595] Furthermore, unlike present law,[596] the Proposed Code requires that the actor have knowledge of the relationship, thus allowing the affirmative defense of mistake of fact.[597]

The Proposed Code provides no special penalty for incest with children, but instead relies on the statutory rape provisions to provide stiffer penalties for such conduct.[598] The effectiveness of this proposed

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fense if he did not know of the invalid judgment at the time he entered into the bigamous marriage. Presumably judicial construction will require that the actor actually rely upon the invalid judgment before this defense can be successfully asserted.

591. Currently a bigamist is punished by up to five years imprisonment. WASH. REV. CODE § 9.15.010 (1959). A consort may be punished by up to five years or a $1,000 fine. WASH REV. CODE § 9.15.020 (1959). Under the Proposed Code bigamy is a third degree felony which is punished by up to five years and/or a $5,000 fine. R.W.C.C. §§ 9A.64.010(3), 9A.20.020(1)(c).

592. The relationship may be legitimate or illegitimate. R.W.C.C. § 9A.64.020(1) and (2).

593. *See* R.W.C.C. § 9A.64.020, Comment.

594. WASH. REV. CODE § 9.79.090 (1959). The Proposed Code's narrower definition, excluding such relatives as great uncles and aunts, is probably not of practical significance. The exclusion of first cousins is perhaps more significant.

595. State v. Bielman, 86 Wash. 460, 150 P. 1194 (1915).

596. State v. Glindemann, 34 Wash. 221, 75 P. 800 (1904).

597. R.W.C.C. §9A.08.040(1)(a).

598. The Code provision on incest basically makes no age distinction in its penalties, except in the case of stepchildren and adopted children eighteen years old and older. R.W.C.C. § 9A.64.020(1) and (2). *See* the comments following this section. The age distinctions are retained in the statutory rape provisions. R.W.C.C. §§ 9A.44.040-.060, which vary their penalties with the age of the victim. These rape provisions apply equally to incestuous intercourse, providing the other elements of rape are satisfied.

scheme is questionable. As under current law,[599] the proposed incest provision requires no corroboration beyond the testimony of the other party.[600] However, the proposed statutory rape provision does require corroboration.[601] Since the bulk of incest cases involve children and arise in situations where corroborating testimony is unlikely, the crime of incest with children under the Proposed Code often will have to be prosecuted under the general incest provision rather than the statutory rape section. Consequently, the more severe penalties for such crimes will be effectively nullified.[602]

XV. DISORDERLY CONDUCT

A. Riot

The proposed crime of riot is committed when a person, "acting with four or more other persons, . . . intentionally and unlawfully uses or threatens to use force against any other person or against property."[603] The effect of this provision is to narrow the crime of riot to group assault and/or battery, leaving many of the traditional elements of the riot offense to other more appropriate sections.

The current Washington statutes[604] are essentially restatements of common law unlawful assembly[605] and riot,[606] with some extension

599. State v. Coffey, 8 Wn.2d 504, 112 P.2d 989 (1941).

600. R.W.C.C. § 9A.64.020 does not require corroboration for incest. However, R.W.C.C. § 9A.44.010 does require corroboration for "sexual offenses" with the exception of sexual contact in the third degree.

601. R.W.C.C. § 9A.44.010.

602. For example, in a case like State v. Davis, 20 Wn.2d 443, 147 P.2d 940 (1944), where there was no corroboration because the daughter was home alone with her father, prosecution under the Proposed Code would have to be based on the incest provision. The maximum penalty would be reduced from the twenty years provided by WASH. REV. CODE § 9.79.090(2) (1959), to five years under R.W.C.C. § 9A.64.020(3).

603. R.W.C.C. § 9A.84.010.

604. *See* WASH. REV. CODE §§ 9.27.040-.050 (1959) (riot), 9.27.060 (1959) (unlawful assembly), 9.27.070 (1959) (remaining after warning), 9.27.080 (1959) (destruction of property), 9.27.090 (1959) (disguised and masked person), and 9.27.100 (1959) (owners of premises allowing masqueraders).

605. *See* PERKINS at 403: "An unlawful assembly is a meeting of three or more persons with a common plan in mind which, if carried out, will result in a riot." *Accord,* M.P.C. § 250.1, Comment (Tent. Draft No. 13, 1961) (which notes that "disorderly conduct" is a statutory offense very akin to common law "breach of the peace"); Comstock v. United States, 419 F.2d 1128 (9th Cir. 1969) (concurring opinion).

606. *See* PERKINS at 405:

A riot is a tumultuous disturbance of the peace by three or more persons acting

and elaboration. The proposed Code makes a number of significant changes in the current law.[607]

First, the minimum number of persons required to constitute the crime of a riot is increased from three to five.[608] This increased participant requirement reflects the belief that "mob behavior [is] more dangerous and frightening, . . . [and] it poses special problems for police."[609] The drafters of the Proposed Code suggest that groups of less than five persons engaging in the type of behavior prohibited by the proposed riot statute "are more appropriately dealt with by other offenses such as assault or criminal mischief."[610]

Second, the Proposed Code requires the *intentional* use or threat of unlawful force, whereas the current law[611] on its face has no scienter requirement apart from requiring proof of some *purpose* for the antecedent assemblage.[612] The current law does attach a more serious penalty where the purpose of the assembly or the intent of the actors

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together (a) in the commission of a crime by force, or (b) in the execution of some enterprise, lawful or unlawful, in such a violent, turbulent and unauthorized manner as to create likelihood of public terror and alarm.

It may be noted that the common law crime of "rout" (movement of an unlawful assembly toward the scene of the unlawful act) has never been incorporated into the Washington law as a separate offense.

607. For a listing of purposes for revising disorderly conduct statutes, see M.P.C. § 250, Comment (Tent. Draft No. 13, 1961). It may be useful to note that the present Washington law is virtually identical to the New York Penal Law of 1909 regarding riot. *See* N.Y. PENAL LAW §§ 2090-2093 (McKinney 1967) (Appendix).

608. R.W.C.C. § 9A.84.020(1)(a). This change is consistent with the new formulations in New York, Connecticut and Oregon, and the proposed code for Michigan, each of which increases the number of persons required. *See* N.Y. PENAL LAW § 240.05 (McKinney 1967) (five or more); CONN. GEN. STAT. ANN. § 53a-175 (Special Pamphlet 1972) (seven or more); MICH. REV. CRIM. CODE § 5510 (Final Draft 1967) (six or more); ORE. REV. STAT. § 166.015 (1971) (five or more).

609. M.P.C. § 250.1, Comment (Tent. Draft No. 13, 1961). The comment notes that the number of persons differentiating mob action from individual action must necessarily be somewhat arbitrary. M.P.C. § 250.1 retains the requirement that three or more persons be involved.

610. R.W.C.C. § 9A.84.010, Comment 2, at 336. See R.W.C.C. §§ 9A.36.010-.030 (assault), 9A.48.050-.070 (criminal mischief).

611. WASH. REV. CODE § 9.27.040 (1959).

612. The Washington Supreme Court has held that a bystander is not liable simply because he is present at the scene of a riot. State v. Moe, 174 Wash. 303, 24 P.2d 638 (1933). Although the Washington court does not seem to have passed directly upon the requirement of intent, it said in *Moe:* "[W]hen several people are engaged in perpetrating a crime, each is responsible for the acts of the others done in furtherance of the *common purpose* . . . and all who participate are chargeable with . . . riot . . . ." (emphasis added). *Id.* at 306, 24 P.2d at 639. The Proposed Code equates intent with purpose. *See* R.W.C.C. § 9A.08.020(2). *See also* Comstock v. United States, 419 F.2d 1128 (9th Cir. 1969) (discussing Washington law as applied in the Assimilative Crimes Act).

is essentially to obstruct the administration of government.[613] The Proposed Code eliminates any distinction between penalties based on the purpose of the assembly or the actions.[614] In addition, the drafters of most modern revised criminal codes have phrased the scienter requirement for riot in terms of intentionally or *recklessly* causing or creating a grave risk of causing public alarm.[615] The Proposed Code, by comparison, leaves unregulated all activity which results from the actor's conscious disregard of the fact that his group's behavior creates a grave risk of causing public alarm.[616]

Third, the Proposed Code eliminates the incitement provision of the current law[617] on the ground that it is covered by basic principles of accessorial liability.[618] This change eliminates the separate penalty for incitement and leaves the accessory liable for the same offense as that committed by those incited. This is a substantial change in the current statutory law and the common law, both of which recognize that the crime of inciting to riot is complete without the perpetration of the offense solicited.[619]

Fourth, the Proposed Code eliminates disturbing the peace as an element of the crime of riot, and instead requires that there be a threat to use force or violence against another person or property.[620]

Finally, the Proposed Code eliminates the increased penalty which presently is imposed if the rioting offender is disguised,[621] and also

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613. *See* WASH. REV. CODE § 9.27.050(1) (1959). Also, in 1971 the Washington legislature made it a separate gross misdemeanor to interfere with, obstruct, or impede the administration of justice by picketing or parading. WASH. REV. CODE § 9.27.015 (Supp. 1971).

614. *But see* R.W.C.C. ch. 9A.76 (obstructing governmental operation).

615. *See* codes cited note 608 *supra*.

616. Recklessness presumably will suffice under the present statute which contains no express mens rea requirement. WASH. REV. CODE § 9.27.040 (1959). The drafters suggest that this change is made to avoid possible constitutional problems of vagueness. *See* R.W.C.C. § 9A.84.010, Comment at 337.

617. WASH. REV. CODE § 9.27.050(2) (1959) provides that if the actor "shall direct, advise, encourage or solicit other persons present or participating in a riot or assembly to acts of force or violence," then the actor is guilty of riot.

618. *See* R.W.C.C. § 9A.84.010, Comment 2, at 336-37 (cross referencing to R.W.C.C. 9A.08.060, which governs liability for the conduct of another and complicity).

619. PERKINS at 650. Both the Oregon code and the proposed Michigan code eliminate incitement to riot as a separate offense. *See* codes cited note 608 *supra*. But see the recently enacted revised criminal codes of New York and Connecticut, both of which retain incitement as a separate offense. N.Y. PENAL LAW § 240.08 (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-178 (Special Pamphlet 1972).

620. WASH. REV. CODE § 9.27.040 (1959) does treat disturbing the peace as an element of the crime of riot. The Proposed Code includes disturbing the peace only within the broader offense of disorderly conduct. R.W.C.C. § 9A.84.030.

621. *See* WASH. REV. CODE § 9.27.050(1) (1959). The present criminal provisions

eliminates the current separate offenses of assembling in disguise and knowingly permitting such assemblies on certain premises.[622] These changes are consistent with most modern revised criminal codes.[623]

As does the current law, the Proposed Code treats the fact that the actor is armed with a deadly weapon as an aggravating circumstance which warrants a more severe penalty.[624]

B. Failure to Disperse

The proposed offense of failure to disperse replaces the existing Washington laws of unlawful assembly[625] and remaining after warning to disperse.[626] This offense requires: (1) overt acts within a group of four or more persons which create a substantial risk of causing personal injury or substantial property damage, *and* (2) the intentional refusal or failure to disperse when officially ordered to do so.[627] This formulation differs from the present Washington approach, which makes "unlawful assembly" an inchoate riot offense needing no overt act beyond assembly, and which makes failure to disperse a strict liability offense after the warning or order to disperse has been given.[628]

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dealing with activity done in disguise primarily are designed to deal with the activities of organizations such as the Ku Klux Klan. There seems to be little current need for an increased penalty for such activity. Note that federal law already covers this type of activity. 18 U.S.C. § 241 (1970).

622. *See* WASH. REV. CODE § 9.27.090-.100 (1959).

623. *See* codes cited note 608 *supra*. Presumably, much of the behavior presently prohibited is adequately covered by federal law. *See* 18 U.S.C.A. § 241 (1970).

624. *See* R.W.C.C. § 9A.84.010 (making armed rioting a third degree felony, which is punishable by imprisonment in a state correctional institution for a maximum term of not more than five years or by a fine of not more than one thousand dollars or both). *See also* R.W.C.C. § 9A.20.020(1), (2). Otherwise rioting is punished as a gross misdemeanor. For current Washington law, see WASH. REV. CODE § 9.27.050(1) (1959) (imposing the same penalty as does the Proposed Code).

This increased penalty seems appropriate, as the drafters of the Code point out, in light of the increased risks created. *See* R.W.C.C. § 9A.84.010, Comment at 337.

625. WASH. REV. CODE § 9.27.060 (1959).

626. WASH. REV. CODE § 9.27.070 (1959).

627. R.W.C.C. § 9A.84.020. The comment to this section suggests that "failure to disperse" must be *with knowledge* of the order to disperse before any liability attaches. *Id.*, Comment at 340.

628. In State v. Fisk, 79 Wn.2d 318, 324, 485 P.2d 81, 84 (1971), the court stated:

> It is thus apparent that the primary thrust of RCW 9.27.060 [unlawful assembly] is to prohibit and/or punish those persons who would *knowingly participate* in an assemblage of three or more individuals entertaining a common intent to commit an unlawful act by force, disrupt or threaten to breach the public peace, injure or

The current Washington provision proscribing threats or acts tending toward a breach of the peace, or an injury to persons or property[629] is narrowed under the Proposed Code: (1) mere threats are no longer sufficient—there must be an act creating the risk, and (2) the risk regarding property damage must be substantial.[630]

Finally, it should be noted that, while the Proposed Code narrows the prohibited behavior to conduct of a more serious nature, the penalty for violating the statute is reduced from a gross misdemeanor to a misdemeanor.[631]

C. Disorderly Conduct[632]

The Proposed Code defines four categories of actions constituting disorderly conduct:[633] (1) intentional production of noise which is found to be excessive and unreasonably disturbing;[634] (2) use of abusive language[635] which thereby recklessly creates a risk of assault;[636]

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threaten to injure persons or property, or to commit or attempt to commit any unlawful act. *Criminal intent is the touchstone of the offense defined. State v. Dixon,* 78 W.D.2d 813, 479 P.2d 931 (1971).

... [T]he elements of the offense set forth in RCW 9.27.070 [failure to disperse] may be listed as: (1) the unauthorized presence of the person charged at an unlawful group meeting; (2) the issuance to that person of a warning to disperse by a magistrate or public officer; and (3) the failure or refusal to disperse after such warning. *Criminal intent on the part of the person charged is not a prerequisite to conviction.* (emphasis added).

629. WASH. REV. CODE § 9.27.060(3) (1959).

630. R.W.C.C. § 9A.84.020(1)(a).

631. *See* WASH. REV. CODE § 9.92.020 (1959) (gross misdemeanor is punishable by imprisonment for up to one year in the county jail or a fine of not more than one thousand dollars, or by both); R.W.C.C. § 9A.20.020(3) (misdemeanor is punishable by imprisonment for up to ninety days in the county jail or a fine of not more than five hundred dollars or by both). The drafters apparently believe that the current penalties are too severe for the risks involved; thus the reduction of this offense to a misdemeanor is in keeping with the overall tenor of this chapter of the proposed Code.

632. This proposed provision covers conduct currently dealt with in various sections of Title 9: WASH. REV. CODE §§ 9.11.050 (provoking assault), 9.27.010 (disturbing meeting), 9.27.020 (disturbance on highway), and 9.87.010 (vagrancy). R.W.C.C. § 9A.84.030, Comment at 341.

633. R.W.C.C. § 9A.84.030.

634. R.W.C.C. § 9A.84.030(1)(a). The drafters state: "If the actor does not intend to cause the proscribed result at the time of his conduct, it would seem clear that once informed of the fact ... a continuation of the behavior would bring the actor within the statute." *Id.,* Comment at 341.

635. Using a concept of "symbolic language," the courts could easily include the use of a "sign" or "gesture" as part of the prohibited abusive language and thus, in this respect, the Proposed Code would be consistent with present law. *See* WASH. REV. CODE § 9.11.050 (1959) (provoking assault).

(3) intentional disruption, without lawful authority, of any lawful assembly or meeting; and (4) intentional obstruction of vehicular or pedestrian traffic.

The most significant aspects of the proposed disorderly conduct provision are the specification of mens rea requirements for the conduct proscribed, and a reduction in the degree of the offense.[637]

The present law does not proscribe conduct which creates noise disturbances as does the Code's disorderly conduct provision.[638] However, such conduct is covered to some extent by the existing statute which prohibits wilful provocation, by word, sign, or gesture, of another person, to commit assault or breach of the peace.[639]

The proposed provision prohibiting intentional disruption of any lawful assembly[640] is similar to present Washington law,[641] except that the proposed statute applies only to the disruption of a "lawful" meeting, while the present law applies to any meeting "not unlawful in its character." Thus under the Proposed Code an unauthorized person could disrupt with impunity a meeting not unlawful in its character, but technically unlawful.[642]

636. "Recklessness" under the Proposed Code requires knowledge of *and* conscious disregard of a substantial and unjustifiable risk. *See* R.W.C.C. § 9A.08.020(2)(c). This requires the prosecution to prove that the defendant knew that his use of the language in question would create a substantial risk of assault and consciously disregarded the possible or probable consequences of his conduct.

637. Disorderly conduct is a violation under the code. R.W.C.C. § 9A.84.030. The drafters state:

> The grading of this offense as a violation reflects the judgment that the conduct governed is of minor criminological significance, and that any such conduct that threatens more than minimal harm is adequately dealt with by other provisions . . . .

Id., Comment at 341. This gradation follows the New York provision for making unreasonable noise. See N.Y. PENAL LAW § 240.20 (McKinney 1967). *But see* CONN. GEN. STAT. ANN. § 53a-182 (Special Pamphlet 1972) (making such offense a misdemeanor); MICH. REV. CRIM. CODE § 5525 (Final Draft 1967); ORE. REV. STAT. § 166.015 (1971); M.P.C. § 250.1 (Tent. Draft No. 13, 1961). A violation may be punished by a fine of not more than five hundred dollars. R.W.C.C. § 9A.20.020(4)(c).

This constitutes a reduction from a gross misdemeanor in one instance, WASH. REV. CODE § 9.27.060 (1959) (unlawful assembly), and from a misdemeanor in all others. For penalty provisions, see note 631 *supra*.

638. R.W.C.C. § 9A.84.030(1)(a). The only direct reference to such conduct under present law is WASH. REV. CODE § 9.27.020 (1959) (disturbance on highway).

639. WASH. REV. CODE § 9.11.050 (1959). Note that provoking assault is proscribed by the Code's disorderly conduct provision which punishes recklessly creating a risk of assault by use of abusive language. R.W.C.C. § 9A.84.030(b).

640. R.W.C.C. § 9A.84.030(1)(c).

641. WASH. REV. CODE § 9.27.010 (1959). Under this statute, shouting a derogatory but not obscene expletive by one opposed to the speaker without any indication of further purpose or intent to break up the gathering is not an unlawful disruption. *See* Spokane v. McDonough, 79 Wn. 2d 351, 485 P.2d 449 (1971).

642. A meeting is technically unlawful when, for example, it is unlawful as to

Finally, the disorderly conduct provision prohibits the intentional obstruction of vehicular or pedestrian traffic.[643] In order to avoid possible constitutional problems raised by prosecuting a person who obstructs traffic while attempting to assert his first amendment rights under the United States Constitution,[644] the Code defines "obstruct" as rendering "impassable without subjecting others to unreasonable inconvenience or hazard" and exempts a gathering of persons to hear a person speak or otherwise communicate.[645]

The exemption of persons gathered to hear a speaker is obviously designed to insure protection of first amendment rights, but it is arguable that this exemption goes too far. Of the other modern codes examined, only the proposed Michigan code[646] goes as far as the Proposed Code in exempting such gatherings even though they be intentionally obstructive.[647] The Model Penal Code generally proscribes obstructive conduct, which is engaged in either intentionally or recklessly, and excepts persons gathered to hear a speaker only where their actions result in reckless obstruction.[648] Even this limited exception applies only until such time as the persons so gathered are officially ordered to move.[649] It is highly questionable whether the first amendment requires allowing the intentional obstruction of traffic simply because the persons engaging in the conduct are gathered to hear a speaker; the Model Penal Code formulation might be a desirable alternative to the Proposed Code provision.

Finally, the obstruction of traffic provision of the Code is classified

time and/or place, but otherwise lawful. Under the current law if the meeting were lawful in character, a disruption without lawful authority would be an offense. Consistent with the previous subsections of the Proposed Code, the offense is down-graded from a misdemeanor to a violation.

643. R.W.C.C. § 9A.84.030(1)(d). Present Washington law does not specifically prohibit the intentional obstruction of traffic as does the Code. However, the unlawful assembly provision, WASH. REV. CODE § 9.27.060 (1959), presumably would cover such conduct by groups of three or more.

644. R.W.C.C. § 9A.84.030(1)(d), Comment at 342.

645. *See* R.W.C.C. § 9A.84.005(1). The language of this section is similar to that of M.P.C. § 250.2(1), but, unfortunately, it is not without ambiguity. The clear intent of the drafters is to limit application of the statute to those instances where passage cannot be accomplished without exposure to unreasonable inconvenience or hazard. However, as presently drafted, the statute might be read as applying only where the passersby are *not* subjected to unreasonable inconvenience or hazard.

646. MICH. REV. CRIM. CODE § 5501(a) (Final Draft 1967).

647. *See* N.Y. PENAL LAW § 240.20(5) (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-182(5) (Special Pamphlet 1972); ORE. REV. STAT. § 166.025(e) (1971). None of these codes expressly seeks to protect first amendment rights.

648. M.P.C. § 250.7.

649. *Id.*

only as a violation even though it requires a mens rea of intent.[650] This differs from most other modern revised codes which classify such an offense as a misdemeanor while requiring the lower mental state of recklessness.[651]

D. False Reporting

The Proposed Code makes it a gross misdemeanor to knowingly make a false report or warning of an alleged occurrence or impending occurrence of a fire, explosion, crime, catastrophe, or emergency, with knowledge that it is likely to cause public inconvenience or alarm.[652] This formulation is consistent with other modern criminal codes.[653]

Current Washington law does not proscribe most of the conduct within this proposed provision. However, one existing statute prohibits bomb threats or threats to injure property as well as knowing communication of any information concerning such threats with intent to alarm others.[654] The Proposed Code would proscribe other conduct which presents the same sort of evil as that covered by the current Washington law,[655] while reducing the existing mental state requirement from "intent to alarm" to "knowledge of likelihood of alarm." This reduction of the mental state requirement is consistent with other modern formulations[656] and seems reasonable in light of the gravity of the potential evil.[657]

650. The maximum fine is $500. R.W.C.C. § 9A.20.020(4).

651. *See* MICH. REV. CRIM. CODE § 5525(2) (Final Draft 1967); ORE. REV. STAT. § 166.025(e) (1971); CONN. GEN. STAT. ANN. § 53a-182(b) (Special Pamphlet 1972). *But cf.* N.Y. PENAL LAW § 240.20 (McKinney 1967) (making the offense a violation but with a lower mental state of recklessness). It should be noted, however, that the above cited codes require either intent to cause public inconvenience or reckless creation of a risk thereof. The Proposed Code has no requirement that public inconvenience either be intended or result, thus, an absolutely deserted sidewalk might be rendered impassable and thereby be "obstructed."

652. R.W.C.C. § 9A.84.040.

653. *See* N.Y. PENAL LAW § 240.50(1) (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-180(a)(1) (Special Pamphlet 1972); MICH. REV. CRIM. CODE § 5550 (Final Draft 1967); ORE. REV. STAT. § 166.025(g) (1971) (treating this offense as part of disorderly conduct); M.P.C. § 250.3.

654. *See* WASH. REV. CODE § 9.61.160 (1959).

655. The drafters suggest such an offense should be in the criminal code, because the risks of panic and consequential personal injury or property damage or the risks created by emergency calls by police or firefighting officials are serious. R.W.C.C. § 9A.84.040, Comment.

656. Codes cited note 653 *supra*.

657. The drafters of the Model Penal Code, in commenting upon a similar provision in that code, said: "The behavior dealt with in this section is an aggravated

E. Public Intoxication

The Proposed Code prohibits public intoxication due to alcohol, narcotics or other drugs where the degree of intoxication is such that it endangers the intoxicated person or other persons or property or annoys persons in his vicinity.[658] This offense is graded as a misdemeanor in order to avoid the problem of "leaving the actor free to return immediately to his conduct,"[659] a result which could occur if the officer is restricted to merely issuing a citation for a violation. The Code drafters view this section as merely a "short-term stopgap," with the ultimate goal being the development of widespread detoxification treatment and counselling centers to deal with the problem.[660]

Subsequent to the drafting of the Proposed Code, the Washington Legislature enacted the very comprehensive Uniform Alcoholism and Intoxication Treatment Act.[661] Sections 12 and 13 of this Act seem to meet the problems which the Proposed Code addresses by effectively providing for protective custody and/or emergency commitment to an approved treatment facility. This new Act treats public intoxication as a public health problem rather than as a criminal problem. In light of this recent legislation, the proposed provision dealing with public intoxication should be deleted from the Proposed Code.

F. Loitering[662]

The proposed loitering section replaces the current vagrancy law[663]

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form of disturbing the peace which . . . can have grave consequences." M.P.C. § 250.8, Comment at 52 (Tent. Draft No. 13, 1961).

658. R.W.C.C. § 9A.84.050. For a comprehensive discussion of criminalizing public intoxication, see Morris, *Overcriminalization and Washington's Revised Criminal Code,* at pp. 11-16 of this volume.

659. R.W.C.C. § 9A.84.050, Comment at 345.

660. *Id.*

661. Ch. 122 [1972], Wash. Laws 2nd Ex. Sess.

662. R.W.C.C. § 9A.84.060.

663. WASH. REV. CODE § 9.87.010 (1959) includes thirteen separate vagrancy offenses, punishable as gross misdemeanors. The statutory crime of vagrancy, the historical antecedent of loitering, has been defined as: " 'status' resulting from misconduct and in the form of a socially harmful condition or mode of life which has been defined and made punishable by law." PERKINS at 427. The validity of attaching criminal processes to status or associational relationships was upheld in Scales v. United States, 376 U.S. 203, 227 (1961), without the requirement of the commission of specific acts of criminality. *But cf.* Robinson v. California, 370 U.S. 660 (1962) (holding *status* as a drug addict could not be made subject to criminal penalty without contravening the eighth amendment).

and makes several changes which may best be noted by examining each provision seriatim.[664] Generally, this section defines "loitering" as remaining in or about some particular public place for a specified unlawful purpose.[665]

First, this provision of the Code makes it an offense to remain in a public place for the purpose of engaging or soliciting another person to engage in prostitution.[666] It is significant that this provision, unlike the present law,[667] applies to such activity only when it occurs in a public place.[668] Thus, remaining in a place designed for actual residence for the purpose of engaging in or soliciting prostitution is not unlawful since such a place is expressly excepted from the definition of a "public place," even though a substantial group of persons might have access.[669]

664. Certain portions of the current vagrancy statute are deleted altogether. For a listing of subsections not included, and the drafters' reasons for not including them, see R.W.C.C. § 9A.84.060, Comment at 347-48.

665. The Proposed Code expressly rejects the language of the Model Penal Code which states:

> A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity.

M.P.C. § 250.6. The Model Penal Code expressly would consider the refusal to identify oneself upon request by a peace officer among the circumstances warranting alarm.

It has been noted that a constitutional dilemma is presented by loitering statutes:

> To avoid the dangers of vagueness, the statute should focus on failure to account for oneself in certain circumstances [as does the Model Penal Code]; yet, to respect the privilege against self-incrimination, the statute must focus on loitering conduct itself.

Note, 43 WASH. L. REV. 844, 855 (1968). The drafters of the Proposed Code cite this Note and reason that the constitutional dilemma can be avoided: "with properly drafted criminal statutes and a useful doctrine of attempt, there is no pressing need to twist loitering statutes into specie of inchoate offense." R.W.C.C. § 9A.84.060, Comment at 346.

666. R.W.C.C. § 9A.84.060. This provision should be read in conjunction with the "public indecency" provisions which make prostitution and/or patronage of a prostitute unlawful. R.W.C.C. § 9A.88.020-.035. The relationship is discussed by the drafters at R.W.C.C. § 9A.84.060, Comment. Taken together these provisions proscribe essentially the same acts as the present sections, prohibiting the practice or solicitation of prostitution as well as keeping, living in or working in a house of prostitution. WASH. REV. CODE § 9.87.010(3), (9) (1965).

667. WASH. REV. CODE § 9.87.010(3), (9) (1965).

668. The Proposed Code defines "public place" as "a place to which the public or a substantial group of persons has access" but not rooms or apartments designed for actual residence. R.W.C.C. § 9A.84.005(2).

669. Although the exception of rooms or apartments designed for actual residence is an exception from a non-exclusive and non-exhaustive list of examples of "public places," it seems probable that the drafters meant the provision to be construed to exclude such rooms or apartments from the definition of "public place."

This proposed provision is basically consistent with the revised code adopted in New York and that proposed for Michigan. N.Y. PENAL LAW §§ 240.00(1), 240.35(3) (McKinney 1967); MICH. REV. CRIM. CODE §§ 5501(b), 5540(1)(c), 5540(3) (Final

This provision also prohibits remaining in any transportation facility,[670] unless specifically authorized to do so, for the purpose of soliciting or engaging in any *commercial* activity. This provision is new to Washington law,[671] and the drafters' comments indicate it is designed to protect travelers in busy transportation facilities from annoyances and harrassment and minimize the likelihood of the sort of petty property offenses which often occur in such places.[672]

In addition, this provision makes it unlawful to remain in any place with another person for the purpose of unlawfully using or possessing a narcotic or dangerous drug.[673] This provision operates as a supplement to drug control laws by aiding law enforcement under circumstances in which actual use of drugs cannot be proven.[674]

Further, this statute makes it a violation to remain in or near any court, jail, morgue or hospital, for the purpose of soliciting business

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Draft 1967). The Proposed Code is also in accord with those codes in grading the loitering offense as a violation which would eliminate the possible jail sentence in Washington under the current vagrancy statute.

670. R.W.C.C. §§ 9A.84.005(3) defines a transportation facility as "any conveyance, premises or place used for or in connection with public passenger transportation...."

671. As the drafters note, this provision covers, *inter alia*, that sort of commercial activity currently prohibited by the vagrancy law. R.W.C.C. § 9A.84.060, Comment. The provision is a direct adaptation of the New York and the proposed Michigan loitering provisions. *See* N.Y. PENAL LAW § 240.35(7) (McKinney 1967); MICH. REV. CRIM. CODE § 5540(f) (Final Draft 1967). Both the New York and the proposed Michigan laws would also prohibit remaining in a transportation facility for the purpose of entertaining persons by singing, dancing, or playing any musical instrument. Such conduct would be covered by the proposed Washington law only insofar as it could be deemed "commercial."

672. R.W.C.C. § 9A.84.060, Comment at 347. Grading this offense as a violation for which a five hundred dollar fine may be imposed for each count seems to be a reasonable and efficacious means to achieve the aforementioned design of the provision. The Proposed Code is not clear as to whether the prohibition of soliciting in transportation facilities applies only to soliciting for commercial activity or to soliciting in general. Current law does make it a misdemeanor for a healthy person to solicit alms. WASH. REV. CODE § 9.87.010(6) (1965).

673. This provision is an adaptation of the New York and the proposed Michigan laws. *See* N.Y. PENAL LAW § 240.35(9) (McKinney 1967); MICH. REV. CRIM. CODE § 5540(g) (Final Draft 1967).

674. R.W.C.C. § 9A.84.060, Comment at 347. Of course, requiring the state to establish the actor's purpose in loitering imposes an extremely difficult burden of proof on the prosecution. The statutory presumptions contained in the illegal possession laws probably still constitute the most effective way for the criminal law to deal with drug sale, possession, and use.

This provision includes a portion of the conduct proscribed by the current law, WASH. REV. CODE § 9.87.010(11) (1965), making it unlawful to be an habitual narcotic user, but without the arguably unconstitutional emphasis on the status of the defendant as an habitual user. Regarding the constitutional problem of using the "habitual user" status as a basis for an offense, *see* Robinson v. California, 370 U.S. 660 (1962).

for an attorney. This provision is essentially a continuation of the current law,[675] merely changing the degree of the offense from an undesignated gross misdemeanor to a violation.[676]

Finally, this provision prohibits intentionally remaining in or about a building or buildings or public premises adjacent thereto of any public or private school without having any lawful reason or relationship involving custody of or responsibility for a pupil or any other license or privilege to be there.[677] This provision is similar to the current law[678] and is basicly consistent with most modern revised criminal codes.[679]

The present Washington loitering provision is currently being challenged. While the Washington Supreme Court upheld its constitutionality,[680] the United States Supreme Court vacated that judgment and remanded it for further consideration in light of two other recent decisions.[681]

The entire disorderly conduct chapter[682] of the Proposed Code treads on ground which is a constant source of constitutional litigation. While the drafters' comments express great concern for limiting

675. WASH. REV. CODE § 9.87.010(19) (1965).

676. The current law provides for imprisonment for not more than six months in the county jail or a fine of not more than $500. WASH. REV. CODE § 9.87.010 (1965). A violation is punishable by a fine not to exceed $500. R.W.C.C. § 9A.20.010(3).

677. R.W.C.C. § 9A.84.060(1)(e).

678. WASH. REV. CODE § 9.87.010(13) (1965). The proposed provision does differ from the present law by requiring a mens rea of intent. The present statute requires that the defendant act "wilfully," a requirement that is met by either intent or knowledge under the present law. *See* State v. James, 36 Wn.2d 882, 221 P.2d 482 (1950).

679. *See* N.Y. PENAL LAW § 240.35(5) (McKinney 1967); CONN. GEN. STAT. ANN. § 53a-185(a) (Special Pamphlet 1972); ORE. REV. STAT. § 166.045(1)(a) (1971); MICH. REV. CRIM. CODE § 5540(e) (Final Draft 1970).

680. State v. Oyen, 78 Wn.2d 934, 480 P.2d 766 (1971).

681. Oyen v. Washington 41 U.S.L.W. 3002 (U.S. June 29, 1972). In Grayned v. City of Rockford, 92 S. Ct. 2294 (1972) the Court upheld an ordinance prohibiting willful noise-making or diversions which disturb or tend to disturb the peace and good order of a school situated adjacent to the location of the person or persons engaged in the disruptive behavior.

The *Grayned* Court, in addressing the issue of constitutional vagueness, held that the ordinance gave adequate warning since it prohibited *willful* interference with normal school activity or *willful* creation of an imminent threat of such interference. The Court further held that the ordinance was not overbroad and did not constitute a broad invitation to discriminatory enforcement, since it did not prohibit any expression, per se, but only prohibited willfully created disruptive noise.

In the other recent decision, Police Dept. of the City of Chicago v. Mosley, 92 S. Ct. 2286 (1972), the Court held an ordinance prohibiting all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute, to be unconstitutionally overbroad. The Court reasoned that the ordinance drew an impermissible distinction between peaceful labor picketing and other peaceful picketing.

682. R.W.C.C. ch. 9A.84.

the proscribed behavior to meet constitutional bounds, the boundary lines are unclear. Therefore, it is essential to consider the broad guidelines set forth by the United States Supreme Court, and to test each of the proposed provisions by determining: (1) whether it gives a person of ordinary intelligence fair notice that his contemplated conduct is forbidden; and (2) whether, even if it gives fair notice, it is so broad as to include behavior which is protected by the Constitution.[683]

XVI. PUBLIC INDECENCY

A. Indecent Exposure

Under the Proposed Code a person commits the misdemeanor of public indecency if he exposes his genitals or anus in a public place knowing his conduct is likely to cause affront or alarm.[684] This provision makes several significant changes in the present law.[685] The major change is that the new Code's specification of *public* places means that exposure in a private place, such as a home, will no longer be criminal.[686] Furthermore, the requirement of knowledge that the conduct will cause affront or alarm suggests that exposure to an audience of adults on notice would not be punishable.[687] The limitation to genitals or anus allows topless performances.[688] The proposed penalty is less severe than the penalty imposed under the existing law covering this conduct.[689]

683. *See* Papachristou v. City of Jacksonville, 92 S. Ct. 839 (1972).
684. R.W.C.C. § 9A.88.010.
685. Current law is found in WASH. REV. CODE §§ 9.79.120 (1959) (indecent or obscene exposure), 9.87.010(7) (1959) (vagrancy—lewd, disorderly, or dissolute persons), and 9.79.080 (1959) (indecent or obscene exposure to children under fifteen years of age). The bulk of the reported cases fall under the latter statute.
686. Although the delicacy of the opinions makes it difficult to be certain, it appears that the bulk of prosecutions have been for exposure in private places. In State v. Galbreath, 69 Wn.2d 644, 419 P.2d 800 (1966), the defendant exposed himself to a seven year old girl in a room of his house. Under WASH. REV. CODE § 9.79.080 (1959) he would be subject to twenty years' imprisonment. Under the Proposed Code he could not be punished for public indecency, although he might be guilty of the misdemeanor of communication with a minor for immoral purposes. R.W.C.C. § 9A.88.015.
687. Current law does not require intent to cause affront. State v. Winger, 41 Wn. 2d 299, 248 P.2d 555 (1952). Conceivably topless and/or bottomless performances could be punished under existing law.
688. The status of current law is unclear. There are no reported cases of prosecutions under state statutes for topless performances.
689. The Code's classification of public indecency as a misdemeanor makes it punishable by up to ninety days in the county jail and/or a fine up to $500. R.W.C.C.

B. Communication with a Minor for Immoral Purposes

The Proposed Code makes it a misdemeanor to communicate with a child under fourteen years of age for immoral purposes.[690] This is similar to current Washington law,[691] except that the Proposed Code reduces the critical age from eighteen to fourteen and changes the grading of the offense from a gross misdemeanor to a misdemeanor.[692]

Present law does not impose a mens rea requirement for this crime, so it is probable that even a reasonable mistake as to the age of the child would not be a defense.[693] Although the Proposed Code also fails to specify a mens rea requirement for this offense, it is arguable that a reasonable mistake negating the mens rea of negligence would be a defense in view of the rules of construction set out in R.W.C.C. § 9A.08.050.[694]

C. Prostitution Offenses

The Proposed Code has separate sections covering the conduct of four classes of people connected with prostitution: the prostitute, the customer, the pimp or madame, and the obliging hotel owner or landlord. In some areas the Code is broader than current law; in other areas it is narrower.

1. Prostitution

Under the Proposed Code a person is guilty of prostitution if such person engages, agrees to engage, or offers to engage in sexual con-

§ 9A.20.020(3). Current penalties may vary from the vagrancy penalty, WASH. REV. CODE § 9.87.010 (1959), of up to six months in the county jail and/or $500, to the penalty for indecent exposure to children under fifteen years of age, WASH. REV. CODE § 9.79.080 (1959), of up to 20 years' imprisonment. This latter penalty, however, may be intended for the more serious crime of taking indecent liberties with a child, which is also covered by WASH. REV. CODE § 9.79.080 (1959).

690. R.W.C.C. § 9A.88.015.

691. WASH. REV. CODE § 9.79.130 (1959).

692. A gross misdemeanor under current law is punished by up to one year in the county jail and/or a fine up to $1,000. WASH. REV. CODE § 9.92.020 (1959). A misdemeanor under the Proposed Code is punished by up to ninety days in a county jail and/or a fine up to $500. R.W.C.C. § 9A.20.020(3).

693. There are no cases on point.

694. See the section on principles of liability and responsibility in this comment.

duct for a fee.[695] The sex of the parties is immaterial.[696] While the scope of the acts designated by "sexual conduct" is unclear, the phrase probably encompasses conduct other than sexual intercourse.[697]

Currently, prostitution is prohibited under two sections of the vagrancy statute which penalize persons practicing prostitution as well as persons living or working in a house of prostitution.[698] Because it is uncertain if male or homosexual prostitution is proscribed under present Washington law,[699] the Proposed Code is potentially broader than existing law in that it explicitly covers male and homosexual prostitution and all sexual conduct, rather than simply intercourse.[700]

The punishment for vagrancy currently is not more than six months in jail or a fine of not more than $500. The offense under the Proposed Code is punishable as a misdemeanor for the first three convictions and as a gross misdemeanor for any conviction thereafter.[701]

2. *Patronizing a Prostitute*

The Proposed Code makes it a violation to patronize a prostitute.[702] There are three forms of patronizing: (1) payment of a fee for sexual conduct with the actor pursuant to a prior understanding, (2) payment of a fee pursuant to an understanding that an individual will engage in sexual conduct with the actor, and (3) solicitation of another to engage in sexual conduct with the actor for a fee.[703]

695. R.W.C.C. § 9A.88.020. The requirement of a "fee" could arguably exclude a mistress who receives general support over a period of time.

696. R.W.C.C. § 9A.88.035 specifies that the sex of the parties is immaterial and that a male can engage in prostitution relative to a female customer.

697. Unfortunately, the Proposed Code does not define "sexual conduct." The Model Penal Code defines "sexual activity" as carnal knowledge, deviate sexual intercourse, and sexual contact. M.P.C. § 207.12(6). In the sexual offenses area, the Proposed Code does define "sexual contact" as the touching of sexual or other intimate parts for the purpose of gratifying sexual desire. R.W.C.C. § 9A.44.005(2).

698. WASH. REV. CODE § 9.87.010(3), (9) (1959).

699. The few reported cases provide no answer.

700. R.W.C.C. § 9A.88.035.

701. R.W.C.C. § 9A.88.020(2)(a) and (b). Since there currently is no such offense as prostitution, all prostitutes convicted under vagrancy statutes would probably start with a clean slate.

702. R.W.C.C. § 9A.88.030. A violation is punishable by a fine of not more than $500. R.W.C.C. § 9A.20.020(4).

703. R.W.C.C. § 9A.88.030. As in the offense of prostitution, the sex of the parties is immaterial. R.W.C.C. § 9A.88.035.

The inclusion of customers within its criminal sanctions is the greatest change effected by the Code. Currently no statute expressly makes the customer guilty of a crime, and no statute has been construed to include such behavior.[704] Although the penalty is slight, the Code does direct at least some pressure to a class of persons much more responsive to modifying their behavior under threat of criminal prosecution. If used, it could have a significant impact on reducing prostitution.

3. *Promoting Prostitution*

The Code punishes persons who promote prostitution with three degrees of severity according to the nature and extent of the promotional activity. There are five variables utilized in grading the offense: (1) age of the prostitute, (2) use of force or intimidation, (3) number of prostitutes promoted, (4) occurrence of activity advancing prostitution, and (5) realization of profit from prositition.[705]

Promoting prostitution in the first degree is a second degree felony[706] and includes a person who either advances or profits from prostitution compelled by force or intimidation, or advances or profits from the prostitution of a person under seventeen years of age. Promoting prostitution in the second degree is a third degree felony.[707] The second degree offense penalizes a person who advances the prostitution of one or more prostitutes or who profits from management, supervision, control or ownership of an enterprise involving two or more prostitutes. The crime of promoting prostitution in the third degree, a gross misdemeanor, punishes the person who knowingly profits from prostitution.[708]

Current law covering the promotion of prostitution is found in

704. Conceivably a customer could be prosecuted as a vagrant under WASH. REV. CODE § 9.87.010(7) (1959), which includes lewd, disorderly, and dissolute persons.

705. R.W.C.C. § 9A.88.050-.070. Two definitions are basic to the statutory scheme. *Advancing* prostitution is knowingly causing or aiding a person to engage in prostitution, soliciting customers, providing persons or premises to operate or assist operation of a house of prostitution, or engaging in any other conduct aiding prostitution. R.W.C.C. § 9A.88.040(1). *Profiting* from prostitution is receiving money pursuant to an agreement to participate in proceeds of prostitution. R.W.C.C. § 9A.88.040(2).

706. R.W.C.C. § 9A.88.050.

707. R.W.C.C. § 9A.88.060.

708. R.W.C.C. § 9A.88.070.

Washington's vagrancy, abduction, and pimping statutes.[709] The great bulk of the cases fall under the pimping section.

Although there are a few areas where the Proposed Code seems narrower,[710] the broad definition of "advances prostitution" found in R.W.C.C. § 9A.88.040 encompasses most of the activity covered by existing Washington law, as well as some additional conduct. In addition to numerous specified activities such as soliciting, the Code includes any conduct designed to "institute, aid or facilitate an act or enterprise of prostitution."[711] Current Washington law does not cover such conduct.[712] Both the current and proposed law have a variety of penalties.[713]

4. Permitting Prostitution

Under the Proposed Code a person is guilty of a gross misdemeanor if he knows premises under his use and control are being used for prostitution and fails to make a reasonable attempt to halt such use.[714]

709. WASH. REV. CODE § 9.87.010(3) (1959) includes as a vagrant every person who solicits prostitution or keeps a house of prostitution. WASH. REV. CODE § 9.87.010 (10) (1959) includes any person who lives or works in a house of prostitution or solicits for any house of prostitution. There are no reported cases.

WASH. REV. CODE § 9.79.050 (1959) punishes persons who take females under eighteen years of age for purposes of prostitution or who inveigle or entice unmarried virgins into prostitution. Again, there are no reported cases.

WASH. REV. CODE § 9.79.060 (1959) punishes a wide range of promotional activity from forcing a female into prostitution to simply living with a prostitute.

710. WASH. REV. CODE § 9.87.010(10) (1959) classifies a resident of a house of prostitution as a vagrant. The Proposed Code makes no reference to such a person. Although WASH. REV. CODE § 9.79.060(4) (1959) makes it punishable for a husband or parent to permit a female to practice prostitution, the Proposed Code does not cover such activity. WASH. REV. CODE § 9.79.060(5) (1959) covers living with or accepting the earnings of a prostitute. The new Code does not cover living with a prostitute; accepting the earnings of a prostitute is covered under the Code only to the extent the money is paid pursuant to an agreement or understanding that the person is to participate in the proceeds of prostitution. R.W.C.C. § 9A.88.040(2). Current law requires no such agreement, nor does it require that the acceptance be a knowing one. State v. Zenner, 35 Wash. 249, 77 P. 191 (1904).

711. R.W.C.C. § 9A.88.040(1).

712. The mere furnishing of facilities for prostitution is not currently prohibited. State v. Basden, 31 Wn.2d 63, 196 P.2d 308 (1948).

713. The Proposed Code's penalties range from up to ten years and/or $10,000 for first degree promoting to up to one year and/or $1,000 for third degree promoting. R.W.C.C. §§ 9A.88.050-.070, 9A.20.020(1)(a)-(c). Currently the penalties range from up to ten years and/or $1,000 for abduction, to up to six months in a county jail or $500 for vagrancy. WASH. REV. CODE §§ 9.79.050 (1959), 9.87.010 (1959).

714. R.W.C.C. § 9A.88.080. This offense directs pressure against people who conceivably would modify their behavior if the law were enforced. Attempted eviction or a complaint to the police would probably exculpate a landlord or property owner.

As a matter of policy, the drafters of the Code believed this offense was necessary "to create a legal incentive" for property owners to refuse to tolerate the use of their premises for such purposes.[715] Permitting prostitution is not punished under existing Washington law.[716]

CONCLUSION

While recognizing that the Revised Washington Criminal Code is a marked improvement over its present counterpart, the student authors of this comment have sought to explain the changes in the Proposed Code, to pinpoint the areas in which the Code might be improved, and to raise issues which the drafters of the Code and its comments do not address. Developments subsequent to drafting of the Code, such as passage of the Uniform Alcoholism and Intoxication Treatment Act[717] and the Supreme Court's decision in *Furman v. Georgia,*[718] require that certain changes be made before the Code is enacted. There are ambiguities in the Code which should be clarified; the definition of "forcible felony" is a good example.[719] In addition, there are changes in the Proposed Code which arguably might impede effective law enforcement; the rape corroboration requirement[720] and the Code's definition of "serious bodily injury"[721] are but a few. Finally, the drafters have failed to treat comprehensively the past problems created by some offenses; their failure to protect against abuse by prosecutors of the kidnapping offense is an example.[722] Hopefully, the students' efforts to isolate these and other shortcomings of the Code and to propose solutions will facilitate an understanding of the Code, and be of aid in the consideration of its passage.

715. R.W.C.C. § 9A.88.080, Comment.
716. State v. Basden, 31 Wn.2d 63, 196 P.2d 308 (1948). However, accepting additional sums above room rent is currently prohibited. State v. Columbus, 74 Wash. 290, 133 P. 455 (1913).
717. Ch. 122 [1972], Wash. Laws 2nd Ex. Sess.
718. 92 S. Ct. 2726 (1972).
719. *See* note 360 *supra.*
720. *See* notes 414, 415 and accompanying text *supra.*
721. *See* the discussion of this point in Mr. Schillberg's article, *A Prosecutor's View of the Revised Washington Criminal Code,* at p. 141 of this volume.
722. *See* notes 382, 383 and accompanying text *supra.*